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UNIVERSITY OF ALBERTA

MORAL EVALUATION, CIVIL DISOBEDIENCE, AND PRO-LIFE ACTIVISM

BY

WAYNE N. RENKE

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND

RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR

THE DEGREE OF MASTER OF ARTS

DEPARTMENT OF PHILOSOPHY

EDMONTON, ALBERTA

FALL, 1990

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SUBMITTED BY WAYNE N. RENKE

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS.

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ABSTRACT

The author analyses and provides criteria for the moral evaluation of civil disobedience, so that certain tactics of pro-life activists may be judged. Morality is described as an independent, basic, natural response characteristic of what is described, following Wittgenstein, as the human form of life. Nietzsche's theory of value as will is considered as an interpretation of morality, is traced into the civil disobedience theories of Hannah Arendt and John Rawls, and is rejected. The author argues that the moral is to be interpreted as that which promotes the existence of each person. The moral is more particularly determined through the moral consensus of communities. The author fixes the morality of the State and of law-abidingness in the promotion by the law of the existence of each person in a law-governed community. Types of error committed by the State and error arising through breakdowns in the moral consensus are discussed. Civil disobedience is then analyzed as a means of combatting error. Two main types of civil disobedience are distinguished--restorative and revolutionary. Both are public breaches of particular positive laws by citizens following standards judged superior to the law to effect legal change. The types differ in that the persons conducting the restorative type assume that the standards are shared and moral consensus remains; persons conducting the revolutionary type assume that the standards are not explicitly shared and moral consensus has broken down. The revolutionary type of civil disobedience has two species, dominative and unitive. Persons conducting the dominative species assume no unity of moral response underlying the breached moral consensus; persons conducting the unitive species perceive deeper unity in the human form of life. The unitive species is a means of eliciting the natural responses of this form of life. The morality of civil disobedience is judged against the following criteria, derived from the fundamental norm of promoting the existence of persons: generalizability, coerciveness, effect on pluralism, direction at

the source of immorality, timeliness, proportionality, and effectiveness. Certain tactics of pro-life activists are classified as dominative revolutionary civil disobedience, and are rejected as immoral.

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ROPER: So now you'd give the Devil the benefit of law!

ST. THOMAS MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws being flat? This country's planted thick with laws from coast to coast--Man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could quietly stand upright in the winds that would blow then?[1]

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[1] Robert Bolt, A Man for All Seasons (Bellhaven House Limited, 1974) 39.

MORAL EVALUATION, CIVIL DISOBEDIENCE, AND PRO-LIFE ACTIVISM

INTRODUCTION

For many, the institutionalization of abortion is an abomination. Some of those offended by the institutionalization of abortion wish to do something. To them, the Courts and the media appear hostile; Parliament too slow and waffling. Like the Indians at Wounded Knee, they say "The time for singing is past", and they determine that they will commit acts of civil — disobedience. Maybe, they think, we will convince the people that our way is right, like Martin Luther King before us. So they join an organization like "Operation Rescue". They engage in tactics such as chaining themselves to pieces of medical equipment. They picket abortion clinics, and scream at pro-choice supporters, who scream back. They sit in before abortion clinics, and go limp in the arms of the police officers who come to arrest them. They hunger strike. Their tactics are the tactics of "direct action", drawn from the tactical lexicon of animal rights and environmental activists. I shall call the pro-life disobedient who use such direct action tactics "pro-life activists".

I find the direct action tactics of the pro-life activists morally troubling.

The fight over abortion is itself, clearly enough, a fight in the moral domain; it is a fight between competing moralities, or between morality and immorality. The moral faculty, however, does not remain blinkered within persons. As the combatants take up political weapons, the moral faculty scrutinizes those weapons and their uses, judging the morality not only of the issue, but of the attack.

Convinced as I am of the truth of the pro-life cause and of the depth of the convictions of those in the pro-life movement, I find it hard to stand in the way of the direct action tactics of pro-life civil disobedience. Why should I? I trust not because

of my bad conscience. I question pro-life activists because I fear that they will do damage. Before they mount the barricades, I must ask them--"Is your civil disobedience moral?"

Were they to ask me my opinion, I would say that even though the cause of pro-life activists is morally correct, their civil disobedience is not. This is because, I would say, their cause arises from a breakdown in the moral consensus underlying Canadian society and the Canadian State; and, even if legal procedures are ineffective, addressing such breakdowns through direct action civil disobedience tactics is immoral, since the tactics threaten the functioning of the State, coerce others, and weaken pluralism; the tactics are not directed at the source of the moral breakdown; and the tactics are not effective. Compendiously, their civil disobedience cannot be moral, since it does not promote the existence of persons.

If they demanded that I explain myself, I would proceed in the following manner:

I have a theory of civil disobedience. I do not claim that it is the only possible theory of civil disobedience; its virtue is that it is consistent with and is derived from what I perceive to be our basic moral orientation towards the full and free development of persons.

I interpret civil disobedience to be of two types, restorative and revolutionary civil disobedience.

Restorative and revolutionary civil disobedience share some basic features. Both restorative and revolutionary disobedience are public breaches of particular positive laws by a citizen or citizens of a State following some standards judged to be superior to or to permit the breaking of the laws broken, to effect legal or State change.

Restorative civil disobedience is primarily educational, in the sense of being "recollective". The restorative disobedient seek to bring other citizens back to first principles accepted by those citizens, to cause those citizens to evaluate current laws

or State actions. The restorative disobedient assume that citizens have moral consensus, within the tolerance of pluralism. The restorative disobedient appeal, indirectly, to constitutional principles or moral principles held by other citizens, in an effort to encourage them to condemn the legal or State action condemned by the disobedient, and, by the power of the massed citizens, to aid in the elimination of the condemned laws or State actions. To support the educational aim, the restorative disobedient are generally non-violent and generally accept the penalty for breaking the law.

Revolutionary civil disobedience is not educational in the same sense as restorative civil disobedience. To some extent, the revolutionary disobedient, like the restorative disobedient, will seek to remind some other citizens of shared principles and to teach other citizens proper principles. Other citizens are to be converted to the principles of the disobedient. The revolutionary disobedient, however, do not assume that all other citizens are members of the same moral consensus as the revolutionary disobedient. Revolutionary disobedience springs from breakdowns in the moral consensus. At this point, revolutionary civil disobedience divides into two species, dominative and unitive. The dominative species is not premised on a layer of morality deeper than the moral consensus. Its inspiration is not the moral unity of persons, but the moral separation between different forms of moral consensus. The dominative disobedient, ultimately, do not intend to convert all citizens; some citizens may be regarded as incorrigible. The dominative species of revolutionary civil disobedience is not a technique for unifying all persons, but for the securing of the ascendancy of one warring form of moral consensus over another. The unitive species, like restorative civil disobedience, is a technique used to return citizens to first principles--not the first principles of the moral consensus, but the first principles underlying the moral consensus, the first principles of human

moral activity, the human form of life, in which all persons are united.

Since in my interpretation civil disobedience is derived from a basic moral orientation, I judge all forms of civil disobedience to have the same moral background:

1. civil disobedience may be morally evaluated;

2. the general moral interpretation in terms of which civil disobedience is evaluated is that moral actions must promote the existence of each person, morally understood;

3. moral standards are more particularly determined through moral consensus;

4. the State is to preserve human rights and to resolve conflicts; insofar as it does so, the State is moral, and citizens will have an obligation to obey the law;

5. the State may act immorally by violating formal moral standards in its treatment of citizens, or by violating substantive moral standards by pursuing immoral policies; alternatively, breakdowns in the moral consensus may occur; and

6. the State should have official and unofficial procedures for correcting error and addressing breakdowns.

Whether civil disobedience can be a moral response to State error or a breakdown in the moral consensus depends on the satisfaction of the following criteria:

1. the disobedient must be sufficiently sure that

   (a) they are combatting significant immorality; and

   (b) they are promoting morality;

2. the official and unofficial procedures for correcting error and addressing breakdowns are ineffective;

3. the disobedience must promote the common good to a greater extent than the <u>status quo</u>; for if the disobedience does not, the disobedient have not overcome the duty to obey the law;

4. the disobedience must be directed at the source of the immorality;

5. the response must be appropriate to the time frame set by the immorality combatted;

6. the response must be proportional to the magnitude of the immorality combatted; and

7. the response must be effective.

The civil disobedience of pro-life activists is dominative revolutionary civil disobedience. It is a response to a breakdown in the moral consensus. The tactics of pro-life activists are immoral because

1. the official and unofficial procedures for correcting error and addressing breakdowns are effective (criterion 2);

2. even if these procedures are not effective, other persons are injured, because pro-life activists

   (a) impair the functioning of a reasonably moral State by encouraging illegal activity,

   (b) reduce pluralism, and

   (c) are coercive (criterion 3);

3. the tactics are not directed at the source of the immorality (criterion 4);and

4. the tactics are ineffective (criterion 7).

To all of this my questioners may respond that I have made a simple moral matter overly difficult, overly subtle. I plead guilty to making of civil disobedience a topic of complexity and caution. Irrationalism must not supplant hard thought, even when the cause is right.

The hardest thought, in my view, is that concerning our basic moral orientation. In the following Chapter, I attempt to establish the moral orientation within which civil disobedience may be comprehended.

CHAPTER 1: THE POSSIBILITY OF MORAL EVALUATION

Unless moral evaluation is possible, I cannot provide a moral evaluation of civil disobedience. In this Chapter, I consider the denial of the possibility of moral evaluation made by the moral skeptic and the response to the moral skeptic. I also provide an interpretation of morality, which establishes the framework for the moral evaluation of civil disobedience.

1.1-the skeptic

The pro-life activists with whom I dispute would be moralists all. A listener, though, might think my whole approach misled. Your morals, he would say, are nothing but a sham. Morals are only a fancy wrapping that persons put around various sorts of self-interest, the better to hide self-interest.[2] We do not know, he would continue, what is morally right or wrong, we only (sometimes) behave as if we do; moral good does not exist, morality is only a pretence. When we talk of morality, we only talk, and each of us talks only for himself. This intervenor, I may fairly say, is a moral skeptic.

If the claims of the moral skeptic are true, if morality is all falseness, embarking on a moral investigation would be useless. Civil disobedience would be no more moral or immoral than baking a cake, sleeping, or killing an Arab.

Why should anyone ever make the claims of a moral skeptic?

Moral skepticism arises from a philosophical interpretation.

Philosophical interpretation is, not surprisingly, the sort of interpretation performed by philosophers. Why should I think that "philosophers", without qualification, share some one form

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[2] "What I say is that 'just' or 'right' means nothing but what is in the interest of the stronger party." (Thrasymachus) Plato, the Republic trans. F. Cornford (New York: Oxford University Press, 1968) I. 388 at 36.

of philosophical activity? Certainly philosophers differ widely in their expositions of their positions. Yet I submit that common to all philosophers and all philosophies is this basic activity of philosophical interpretation. This is a very simple procedure. Philosophers view the world or their experience and select some features or aspects which seem to them to be central or key. The subject of their concern is explained in terms of that feature or set of features; the subject is interpreted. Once an interpretation is settled on, the exposition follows. The interpretation may either be assumed, with the exposition building on the interpretation, or the interpretation may itself be justified by the exposition. Philosophical interpretation must be distinguished from scientific interpretation on the one hand, and other non-scientific interpretations (e.g. literary, legal) on the other. The distinctions between the types of interpretation are founded on the subjects interpreted and the issues resolved by interpretation. Philosophical interpretation differs, usually quite clearly, from other non-scientific interpretations, which concern limited facts (a poem, a plaintiff's evidence) and limited questions (what was his intention/why did he say that?, what was his intention/what did he do?). Philosophy addresses broader subjects and raises broader questions; but so does science. The difference between philosophical and scientific interpretations lies not only in the type of questions each discipline asks, but in the relationship of the interpretations to their subjects. Philosophy is concerned with types or sorts of facts. Additional facts, generated, for example, by experiment, are accounted for in the same manner as the facts already considered by the philosopher. Philosophy, unlike science, is not experimental.[3]

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[3] "A theory is a good theory if it satisfies two requirements: It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations": Stephen W. Hawking, A Brief History of Time (1988)

Philosophical interpretations, like other non-scientific interpretations, are not immune from criticism, even though they may not be verifiable, falsifiable, or confirmable by experiment: "we can all easily recollect disputes which though they cannot be settled by experiment are yet disputes in which one party may be right and the other wrong and in which both parties may offer reasons and the one better than the other."[4] Some formal criteria of evaluating interpretations are internal consistency, coherent conceptual relations, and simplicity or relative freedom from ad hoc assumptions.[5] An interpretation may be superior because of its "elegance", its "fertility", or its ability to stimulate further understandings.[6] Most importantly, an interpretation must explain its subject; it must account for the facts. In ethics, this means that interpretations must, to some degree, "accommodate our firmest convictions".[7] If a philosopher reinterprets too much, if his interpretation is consistent with none of our convictions, we may reject his interpretation as

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9; "...however much philosophers of science may insist that scientific theories are not evaluated solely in terms of whether or not they enable scientists to make precise and specific predictions of observable states of affairs, or to produce these at will, surely these features of science are important; and surely they mark important differences between scientific theories and theories in metaphysics or in theistic religion": Donald D. Evans, "Differences between Scientific and Religious Assertions" in M. L. Diamond and T. V. Litzenberg, edd., The Logic of God (Indianapolis: the Bobbs Merrill Co., 1975) 381 at 398.

[4] John Wisdom, "Gods", in Diamond and Litzenberg, edd. 158 at 165.

[5] Evans at 398.

[6] ibid.

[7] John Rawls, A Theory of Justice (Cambridge, Mass.: The Belknap Press, 1971) at 20, 46, 120.

being "far-fetched".[8] A qualification of the requirement of consistency with convictions is that philosophers are able to change the facts.[9] If people believe and follow the teachings of a philosopher, their behaviour may change, and become aligned with the philosopher's interpretation of their behaviour. Rawls, recognizing this, works to put his interpretation of justice in a state of "reflective equilibrium": an interpretation not only accounts for the facts, it provides guidance to people; an interpretation may precipitate a "Socratic" change of people's convictions, so an interpretation must "work from both ends."[10]

The philosophical interpretation of the moral skeptic is an interpretation of our moral world. A skeptic begins his life in our world. He sees what we see; he judges as we do. He is aware of our morality. He is smitten, then, with the feeling that something is amiss.[11] He confronts three sorts of facts:

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[8] the fallacy of far-fetched hypothesis--Monroe Beardsley, Thinking Straight (4th ed.) (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1975) at 104.

[9] In science, measurement or observation may change the fact; this is different than the voluntary change of people who follow philosophical theories.

[10] Rawls at 20, 48, 49. "Reflective equilibrium" need not entail "coherence" theory, as found, for example, in Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1980) 160f. Analysis and principles may correct or fine-tune moral judgments--but only to a certain extent: I do not say that all moral judgments may be corrected or modified to fit a theory; some, like "thou shalt not murder" are not modifiable, despite the strongest claims of coherence: "The essential thing is that we cannot without transforming our form of life turn just any empirical proposition into a postulate, accommodate just any recalcitrant experience into our system by re-evaluating some other part of it": Roger Shiner, "Wittgenstein and the Foundations of Knowledge" ("WFK") (1977) LXXVIII Proceedings of the Aristotelian Society 103 at 112; see Roger Shiner, "Foundationalism, Coherentism, and Activism" (1980) 3 Philosophical Investigations 33.

[11] Stanley Cavell, The Claim of Reason (New York: Oxford University Press, 1979) at 141.

general (cultural) moral diversity, conflicting moral judgments, and the more-or-less conscious manipulation of morals and moral judgment for non-moral purposes.[12] These are not new or extraordinary facts, they are "facts of such obviousness that no one could fail to recognize them."[13] The facts are recognized in ordinary moral life. We accommodate these facts by various devices, frequently saying that those whose moral judgments do not match ours are either mistaken, manipulated, or lying. The moral skeptic, however, seizes on these facts and our responses to others, and seeks to explain morality by them. How do we know that we are not, and are not all of the time, mistaken, manipulated, or liars? We claim to know what is moral; but we err as other cultures or other persons err, we manipulate our moral talk to suit our purposes. We have no claim to know what is moral. Morality is only talk. The moral skeptic gives us the "experience or sense that [we] may know nothing about the real world."[14] Each of us becomes "sealed off" from the moral world, from others; we are locked into ourselves.

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[12] "Law, morality, religion are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests": Karl Marx and Friedrich Engels, Manifesto of the Communist Party, in Lewis Feuer, ed., Marx and Engels: Basic Writings on Politics and Philosophy (Anchor Books, 1959) 18. Some of Alinsky's reflections on means and ends are the judgments of a skeptic: one's concern with ethics varies inversely with one's interest in the issue, and varies inversely with one's distance from the scene of conflict: Saul Alinsky, Rules for Radicals (New York: Vintage Books, 1972) 26. Moral judgments are dependent on the political position of those sitting in judgment; success or failure is a mighty determinant of ethics; effective means are always judged by one's opponents to be unethical: Alinsky at 26, 30, 34.

[13] Stanley Cavell, "The Availability of Wittgenstein's Later Philosophy", ("Availability") in G. Pitcher, ed., Wittgenstein--The Philosophical Investigations: A Collection of Critical Essays (Anchor Books, 1966) 151 at 170. These facts are for the moral skeptic the equivalent of the hallucinations, dreams and delusions relied on by the epistemological skeptic.

[14] Cavell, The Claim of Reason at 140.

How do we respond to the moral skeptic? How can we win back the moral world?

1.2-the response

A primary response to moral skepticism is to get alongside the skeptic, and kick him. If he protests, you could say, "thus I refute Berkeley." This tactic, however, does not prove that the skeptic keeps a morality hidden in his vest. It may only mean that he does not wish to be hurt. He may not concede that your action is immoral. He may never consider moral criticism.

Four less physical responses to moral skepticism are available.

First, one might argue that some moral truths are indubitable: "we hold these truths to be self-evident...."[15] The difficulty with this argument is that all moral truths may be doubted intelligibly. Even the moral truths we hold most dear may be interpreted to be merely the face of repression or class interest. Furthermore, the indubitability of moral truths may be impugned without accusations of any particular error. A moral truth, even "Thou shalt not kill", may always intelligibly be questioned: Is that commandment correct? Why? What is the basis for our belief in its truth? We can soon run out of answers, and we realize that our moral truths are, at bottom, unjustifiable. The moral skeptic claims victory.

This leads to the second response. One might argue that the moral skeptic misuses moral language. Moral truths may not be indubitable, but that is irrelevant. The moral skeptic attempts to use our moral language. What other language could he try to

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[15] The Declaration of Independence in R. Hofstadter, ed., Great Issues in American History: From the Revolution to the Civil War (Vintage Books, 1958) 71. This is moral "foundationalism", which turns on the idea that "some isolable class of privileged propositions constitutes the given, and that knowledge can rest on so limited a basis": Shiner, WFK 123.

use? Ordinary life and ordinary language function according to various standards of certainty. Absolute certainty is never the standard. The highest standard we have is proof beyond a reasonable doubt. And surely doubting our great moral truths is unreasonable. If the moral skeptic abuses the standards underlying ordinary moral language, he can only speak nonsense.[16]

This response is inadequate. If the moral skeptic did speak nonsense, this response would be apt. The trouble is that the skeptic does not speak nonsense. We know what the skeptic is getting at: "A philosophical question and its plain analogue are not just verbal twins, but in one sense meaning twins also, for the words used have the same meanings in each version. Could it plausibly be otherwise?"[17]; ". . . the philosopher's words must (or must seem to) be used in their normal way, otherwise they would not conflict with what would ordinarily be meant in using them."[18] The moral skeptic confounds us, causes us anguish: could he do so if he spoke without warrant?

This leads to the third response to the moral skeptic. One might argue that the moral skeptic is "operationally inconsistent"; the skeptic's position is self-defeating, because

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[16] "Skepticism is not irrefutable, but obviously nonsensical, when it tries to raise doubts where no questions can be asked.

For doubt can only exist only where a question exists, a question only where an answer exists, and an answer only where something can be said": Ludwig Wittgenstein, Tractatus Logico-Philosophicus trans. D. F. Pears and B. F. McGuiness (London: Routledge and Kegan Paul, 1978) section 6.51; see Shiner, WFK at 119.

[17] Thompson Clarke, "The Legacy of Skepticism" (1972) Journal of Philosophy 754 at 759.

[18] Cavell, Availability at 170.

his assertions are falsified by the making of his assertions.[19] If the moral skeptic can make claims about morality, he must know what morality is. Far from morality being uncertain or unknowable, its certainty is presupposed by the moral skeptic's very speech. This is a strong response to skepticism. The skeptic seems to contradict himself: he claims we cannot know, yet he knows. He claims that only moral talk exists, yet he makes a judgment from a position of authority, from a position superior to moral talk. If the skeptic is able to make his moral claims, then other moral claims may be made, too.

Nevertheless, skepticism survives the operational inconsistency assault. The skeptic may concede that he has moral knowledge. He knows that no one knows what things are moral, and that, for all we know, nothing is moral. In any event, the threat of skepticism does not seem to be removed by allegations of operational inconsistency.[20] This is because, I submit, using Heidegger's words, the skeptic discloses the nothingness in which what-is is manifest. The skeptic displays the lack of ultimate, indubitable foundation of our human activities, and in that way, shows us the way our human activities really are.

This leads to the fourth response to moral skepticism. The moral skeptic speaks with warrant; he expresses what is, in one way, true. Despite this acceptance of the skeptic, morality exists. Morality is a valid form of human existence. Moral knowledge is possible.

The fourth response has two aspects. First, the fourth response acknowledges the facts of our moral life, the diversity,

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[19] John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1986) 74; see Donald Galloway, "No Guru, No Method..." (a review of A. C. Hutchinson's Dwelling on the Threshold) (1988) VIII Windsor Yearbook of Access to Justice 304 at 310.

[20] Prof. Shiner's response to operational inconsistency arguments made by me some time ago was "Ho, ho, ho, QED! Somehow this never satisfies me."

the lies, the lack of foundation seized by the moral skeptic to interpret the human moral condition. The fourth response does not despair over these facts; rather, the fourth response is beckoned by these facts to sift out the moral from the immoral.[21]

The fourth response accepts that moral judgments are not indubitable, accepts that our moral world seems to have no sure grip on objective, inter-subjective, absolute truth. The fourth response does not interpret this weakness to indicate the absence of morality. Rather, this weakness is just where humans find morality. It emerges from our confusion, doubt, and uncertainty. The moral skeptic's interpretation of this emergence is one interpretation of morality, but only one interpretation. This fourth response interprets morality to exist. Morality is a weak thing, but that is just the way human morality is. This fourth response marvels that it exists at all. As an alternative interpretation, this response claims validity equal to the interpretation of the skeptic.

The second aspect of the fourth response is that the response interprets as basic to our morality (as to our other forms of being in the world) not what we discursively think about the world or what we have to say about the world, but the way we naturally act in and respond to the world. This response confronts the skeptic not with words alone, but actions.

We humans belong to a particular "form of life": "What has to be accepted, the given, is--so one could say--<u>forms of</u>

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[21] "...knowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is the essential condition for the emergence of that idea: realization of the variety of notions of right is <u>the</u> incentive for the quest for natural right": Leo Strauss, "Natural Rights, Reason and History" in R. L. Schuettinger, <u>The Conservative Tradition in European Thought</u> (New York: Capricorn Books, 1971) 156 at 157; Finnis at 72, 79.

life."[22] One form of life is distinguished form another by the sorts of responses to the world that come naturally to individuals belonging to a form of life. In Wittgenstein's sense, the human "form of life" is not "the arrangements a particular culture has found convenient," but "those forms of life which are normal to any group of creatures we call human....not patterns of life which differentiate human beings from one another, but those exigencies of conduct and feeling which all humans share."[23] At bottom of forms of life are ungrounded ways of acting. Action, judging, doing, are prior to our linguistic formulation of what we are acting, judging or doing: "our talk gets its meaning from the rest of our proceedings."[24] Prof. Shiner writes "this type of human 'acting' is an essential precondition of the use of language, which is characteristic of the human species."[25] This does not mean that our form of life is based on, ultimately, irrational animal activity. The action which supports our form of life is, from its beginnings, describable in the language of meaningful behaviour.[26]

One set of responses which are natural to the human form of life is the set of moral responses. Morality emerges in our lives and in our language as a result of our natural way of

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[22] Ludwig Wittgenstein, Philosophical Investigations ("PI") (Oxford: Basil Blackwell, 1978) page 226.

[23] Stanley Cavell, The Claim of Reason at 111.

[24] Ludwig Wittgenstein, On Certainty ("OC") trans. G. E. M Anscombe and D. Paul, G. E. M. Anscombe and G. H. von Wright, edd. (Oxford: Basil Blackwell) section 229; "this sort of behaviour is pre-linguistic...a language-game is based on it,...it is the prototype of a way of thinking and not the result of thought": Ludwig Wittgenstein, Zettel, section 541, quoted in John Cook, "Human Beings" in Studies in the Philosophy of Wittgenstein, offprint, 117 at 142.

[25] Shiner, WFK at 105.

[26] Shiner, WFK at 106-107.

acting as humans:

> ...Being sure that someone else is in pain, doubting whether he is, and so on, are so many natural, instinctive, kinds of behaviour towards other human beings, and our language is merely an auxiliary to, and further extension of, this relation. Our language-game is an extension of primitive behaviour (For our language-game is behaviour.) (Instinct).[27]

The interpretation of morality of the fourth response is superior to that of the moral skeptic, because it is consistent with human experience, our everyday and considered moral judgment, that our actions can be morally judged and that we can judge good and evil: "...men behave as if there is a distinction between right and wrong, and...they a great deal of the time can tell them apart. The amount of disagreement there is among men about ethical value has been exaggerated by philosophers with one kind or another of vested interest in moral skepticism."[28]

The moral skeptic could maintain his denial of morality. He could protest that he lives in a non-moral world, and that others do too. My response is that his philosophy is not philosophy for normal humans. If I am wrong, then I do not know what being a human is.[29]

1.3-the way morality is

Moral skepticism is useful, because it prods us to recognize the centrality of morality to life lived as humans live it. The question then arises, Can morality itself be interpreted? Can we account for the presence of morality in our lives? My response is that, in one sense, morality cannot be interpreted; in another

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[27] Wittgenstein, Zettel, section 545, in Cook at 142.

[28] Roger Shiner, "Ethical Perception in Aristotle" Apeiron, offprint, 79 at 84.

[29] see part 2.3, infra, respecting the overman.

sense, it can.

Morality itself, the frame of reference or perspective from which things are judged to be moral, cannot be explained or accounted for or interpreted in terms of any other sort of experience (this is an interpretation).

We have moral experiences: that, I submit, presupposes morality, as a possible mode of human experience. By analogy, time and space are perceived in our experiences of the natural world. Time and space, though, are not items in the natural world (although particular times and spaces are) but time and space are conditions for the possibility of the experience of the natural world. When we perceive a moral action, we perceive morality. But morality cannot be extracted from particular intuitions, any more than can time and space. Suppose that we had no morality. We came into the world with morally blank minds. Suppose that around us were some other people. We heard them utter the words "good" and "bad"; but we also heard the words "beautiful" and "sour". We saw a myriad of behaviours. From these sights and sounds, how could we know where to look to find morality? How could we tell which behaviour was moral, unless we already knew what sort of behaviour was moral? Morality cannot be a construction out of items in the world, because unless we knew what morality was, we would not know what to construct.

Moore makes this same point by exorcising the "naturalistic fallacy". Morality, or "good", as he puts it, cannot be derived from or reduced to or explained in terms of or defined (in an "explanatory definition"[30]) by any natural or metaphysical

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[30] An "explanatory" definition declares "what a thing is". The definiens expresses the definiendum's "essence", "quiddity", "form" or "nature": G. E. Moore, Principia Ethica (Cambridge: Cambridge University Press, 1978) 6, St. Thomas Aquinas, "Being and Essence" in Selected Writings of St. Thomas Aquinas (Indianapolis: Bobbs-Merrill, 1978) 34-36. An explanatory definition is possible where two conditions are met. First, the definiendum must refer to something (e.g. a chattel, process, event, state). Second, the referent must be complex. The definiens of the explanatory definition identifies the referent,

phenomena. One feature of an explanatory definition is that the definiens and definiendum are logically equivalent. The definiendum cannot be denied while the definiens is affirmed, and vice versa. The definiens and the definiendum are equivalent because they refer to the same thing; they are different descriptions of that referent. Given the definiendum "good", any purported definiens may be denied without contradiction. The lack of equivalence is manifested by the ability to question intelligibly whether "good" is indeed any purported definiens.[31]

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by identifying the genus, or general class to which the referent belongs, and the specific differences which distinguish the referent from other members of the same genus: St. Thomas Aquinas, "Being and Essence" at 34-35; H. L. A. Hart, "Definition and Theory in Jurisprudence" (Oxford University Press, 1959) at 13; Beardsley at 210. The definiendum must refer to the referent identified by the definiens. If the definiendum does not refer to anything (whether real or imaginary), definition is not possible; a definiens could not pick out the genus and species of the referent of the definiendum. If the referent is not complex, but simple, definition is not possible; only the genus may be identified, and no specific differences are available to differentiate the referent. Definition is not possible where we lack concepts to differentiate the referent; i.e. the simplicity may lie in the referent or in us. Thus, for either of the immediately preceding reasons, we cannot define colours, or God: Moore at 7, 10, 14.

[31] "To take, for instance, one of the more plausible, because one of the more complicated definitions, it may easily be thought, at first sight, that to be good may mean to be that which we desire to desire. Thus if we apply this definition to a particular instance and say "When we think that A is good, we are thinking that A is one of the things which we desire to desire," our proposition may seem quite plausible. But, if we carry the investigation further, and ask ourselves "Is it good to desire to desire A?" it is apparent, on a little reflection, that this question is itself as intelligible, as the original question "Is A good?" - that we are, in fact, now asking for exactly the same information about the desire to desire A, for which we formerly asked with regard to A itself": Moore at 15-16. Moore takes this to show that good is always "something different" from its purported definiens" "we have two different notions before our minds": Moore at 14, 16.

We do not have concepts capable of differentiating good.[32] We are left with the proposition "good is good, and that is the end of the matter."[33]

Yet another way to make this point is to say that "ought" cannot be derived from "is"; "norms" cannot be derived from "facts".[34]

On the other hand, morality can be interpreted. Morality can be related to human behaviour in general.

Morality is related to human behaviour in general as an area of experience providing reasons for behaviour. Moral reasons are not the only reasons we have. We can have mathematical reasons, aesthetic reasons, legal reasons, any number of different reasons, for acting in one way rather than another. The common feature of reasons is their relative finality. Once we have reasons, we are justified in acting. We may require further reasons, reasons for the reasons. Eventually, our spade may hit

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[32] Moore's view is that good is a simple quality or notion, not "composed of parts": Moore at 7, 9.

[33] Moore at 6.

[34] Finnis at 33. My interpretation of human morality conflicts with that of Finnis. Finnis does not describe morality as a primal form of human existence. Rather, he identifies seven species of basic forms of human good, human flourishing, or basic values: Finnis at 47, 50 n.II.1, 61. These are pre-moral, forming the evaluative substratum of all moral judgments: Finnis at 59. The basic forms are life, knowledge, play, aesthetic experience, friendship or sociability, practical reasonableness, and religion: Finnis at 61, 86, 87, 98 n. IV.2, 88, 89. The basic forms are equally fundamental. They cannot be ranked or priorized: Finnis at 92, 93. Finnis' error is describing the basic forms as pre-moral. He and his basic forms presuppose morality. Were the basic forms not perceived within a moral framework, why would they be values? Why would they be good? Furthermore, the basic forms are not good, considered in themselves. Each of the basic forms is indeed a basic form of human existence and action. Any of the basic forms may be considered from a moral point of view, and, so subsumed, may be judged to have moral value. Alternatively, morality may be considered from the point of view of the other basic forms, and may be judged in terms of that basic form.

bedrock, and we will have no further reasons for some course of action. The finality of particular reasons depends on the depth of the demands of the person requiring the reasons. The finality of reasons is expressed by their obligatory character. Reasons tell us what the answer should be, or what we ought to do. The strength of the obligations imposed by reasons varies. In some cases, our reasons give precise directions, as in mathematics. Once we learn the reasons for mathematical results, we can say "Now I know how to go on", and we can proceed to use the mathematical reasons to come to determinate conclusions. In other cases, our reasons do not give such precise directions, as in morality. We might recognize, for example, that part of justice is to render to every man his due; but this recognition provides no sure means of determining just what might be due to another. "Render to every man his due" has the force of an "ought", but the obligation is diffuse. Moral reasons may be more or less determinative, but moral reasons never achieve the certainty of application of mathematical reasons.

I may say that moral behaviour is rule-following behaviour, in the sense that moral reasons may constitute rules for our actions. I am using "rules" in the abstract manner that I used "reasons". Many forms of human behaviour, including morality, may be described as rule-following. I do not say that all sorts of rules apply in the same manner. Legal rules may apply differently than aesthetic rules, which may apply differently than rules of good sportsmanship, which may apply differently than moral rules. What justifies lumping all the various sorts of reasonable human behaviour together as rule-following behaviour is the fundamental experience of rule-following: once a rule is learned, a person will know, normally, how to go on. A rule has a logic, a principle of immanent development, which when

learned, permits the rule-follower to use or apply the rule.[35]

Thus, morality cannot be interpreted as being derived from or as dependent on any other sort of human experience. The human moral response is interpretable as a type of rule-following behaviour. This judgment fixes the formal operation of the human moral response, but does not identify the content of moral rules, the demands of the "ought" for our lives. In the following Chapter, I identify and reject one popular (if of unrecognized parentage) interpretation of the content of moral rules.

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[35] see Peter Winch, The Idea of a Social Science and its Relation to Philosophy (Atlantic Highlands, New Jersey: Humanities Press, 1977) 30-31.

CHAPTER 2: NIETZSCHE'S UNACCEPTABLE INTERPRETATION

If morality is a possible mode of human experience, I may go on to determine the morality in terms of which I shall evaluate civil disobedience. An interpretation of morality is possible, whereby I can determine which things (actions/events/states) in our world are moral (or "good"). If I did not consider this interpretation to be possible, I could not go on to evaluate the morality of civil disobedience.

But even if the things that are moral may be interpreted, civil disobedience may yet resist moral evaluation. I shall interpret morality as being, more or less, ordinary morality, the sense of right and good underlying our common lives and constitutions. My project of morally evaluating civil disobedience may be challenged. The morality I have in mind may be a figment, an act of bad faith: "When I came to men I found them sitting on an old conceit: the conceit that they have long known good and evil."[36] In particular, according to this objection, my attempt to evaluate civil disobedience is blocked by the true nature of human value, and civil disobedience is beyond good and evil. This is a Nietzschean objection.

The objection is founded on an unacceptable interpretation of morality. In this Chapter, I shall show the unacceptability of this interpretation.

2.1-Nietzsche[37]

The removal of civil disobedience from moral criticism has two stages. First, my morality must be "de-valued", shown to

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[36] Friedrich Nietzsche, Thus Spoke Zarathustra, ("Zarathustra") trans. W. Kaufmann (New York: The Viking Press, 1966) 196.

[37] My interpretation of Nietzsche and Hannah Arendt generally follows that of Allan Bloom, The Closing of the American Mind (New York: Simon and Shuster, Inc., 1987).

have no authentic value or true moral worth. Second, a new account of value (a "transvaluation of values") must be performed, which gives civil disobedience its place. Value is interpreted as will, and civil disobedience as a valuable expression of will.

Nietzsche devalues my morality through his interpretation of my morality.[38] Nietzsche begins with a feeling that something is amiss. Instead of wondering at, or being in awe of our morality, Nietzsche feels nausea.[39] Nietzsche looks at our lives, and sees the "reign of nothingness",[40] the living loathing of man.[41] What we think of as good or moral is but slave morality, a morality of suffering, sickness and ugliness,[42] a morality of mediocrity, that depreciates the human type,[43] a morality founded on the hatred that the impotent bear for the

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[38] Nietzsche's interpretive technique is to contradict our ordinary judgments. We distinguish the real world from appearances: the apparent world is true; the real has been lyingly added: TI at 36. We consider ourselves independent selves: there is no self. We consider ourselves to be free, responsible: Nietzsche denies free will: TI at 38, 49, 53. We consider altruism a commendable trait: with altruism, man is finished: TI at 87. Anarchism and Christianity seek to make our lives better: they deny our lives and are born of revenge and weakness: TI at 87. Nietzsche claims that we constantly mistake cause for effect and effect for cause: TI at 47f.

[39] Friedrich Nietzsche, Beyond Good and Evil ("BGE") trans. M. Cowan (Chicago: Henry Regnery Co., 1967) 31, 116, 220.

[40] Friedrich Nietzsche, The Genealogy of Morals ("GM") trans. F. Golffing (Garden City, New York: Doubleday and Co., 1956) 147 at 208.

[41] GM 258, 261: BGE 116; Friedrich Nietzsche, Twilight of the Idols ("TI") trans. R. J. Hollingdale (Markham, Ontario: Penguin Books, 1975) 19 at 91, 87.

[42] BGE 201.

[43] BGE 114.

strong.[44]

Nietzsche, like the moral skeptic, interprets everyday morality in terms of falseness and error. He will not speak of moral truth.[45] The various human moralities are only tools to justify ways of life.[46] But unlike the moral skeptic, Nietzsche determines that a source of value does exist, hidden beneath the layers of our bogus morality. Nietzsche provides an interpretation of human value. He interprets our moralities as expressing or as evading this source of value. This source of value is what, for Nietzsche, constitutes the "ought" of human value, the obligation supplanting ordinary moral obligation. This source of value is "life": "Everything good is instinct - and consequently easy, necessary, free";[47] "All naturalism in morality, that is all healthy morality, is dominated by an instinct of life....";[48] "What is good? - All that heightens the feeling of power, the will to power, power itself in man:"[49]

> I pursued the living; I walked the widest and the narrowest paths that I might know its nature. With a hundredfold mirror I still caught its glance when its mouth was closed, so that its eyes might speak to me. And its eyes spoke to me.[50]

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[44] GM 22; see G. A. Morgan, What Nietzsche Means (New York: Harper and Row, 1965) 159, 160.

[45] Friedrich Nietzsche, The Antichrist ("AC"), trans. R. J. Hollingdale (Markham, Ontario: Penguin Books, 1975) 113 at 122.

[46] BGE 3, 4, 13, 92, 102, 113, 289; TI 45.

[47] TI 48.

[48] 45.

[49] AC 115; "What are our values and tables of moral goods themselves worth? What comes of their rule? For whom? In what respect?--Answer: for life." The Will to Power in Morgan at 115; "Loyalty to life...is the essential basis of his demand for a revaluation of values": Morgan at 116.

[50] Zarathustra at 114.

Life is not the Hobbesian urge for self-preservation. It is energy, activity, doing--spontaneous, aggressive, overreaching.[51] Life expresses itself in our urges, instincts, and passions.[52] Life is the "will to power",[53] the urge to dominate: "Where I found the living, there I found will to power";[54] "Where there is life is there also will to power."[55]

Our ordinary morality is false because it denies this will to power.[56] Our morality is only slave morality, the morality of those who are powerless, who seek by moral argument to protect ourselves from the bold and strong.[57]

For us to return to the truth of our being, we must return to our instincts, "retranslate man back into nature",[58] free the animal (the "blond beast") trapped within.[59] Nietzsche's prescription for our malaise, our "reign of nothingness", is the adoption of aristocratic values, triumphant self-affirmation.[60]

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[51] GM 199, 211; TI 75: BGE 15. The will to power is originally plural; it is not a unique and universal will, but a plurality of instincts and impulses: Michael Haar, "Nietzsche and Metaphysical Language" in D. B. Allison, ed. The New Nietzsche (Cambridge, Mass.: The MIT Press, 1985) 5 at 9, 10; Alphonso Lingis, "The Will to Power" in Allison, ed. 37 at 40, 45.

[52] Friedrich Nietzsche, The Birth of Tragedy, trans. F. Golffing (Doubleday, 1956) 1 at 84; TI 33, 45, 85; GM 178.

[53] GM 211, BGE 15, 25-26, 202.

[54] Zarathustra at 114.

[55] Zarathustra at 115.

[56] Morgan at 175.

[57] "...ethical systems derive from a weak and impotent will to power reacting against the most affirmative impulses and favouring negation and destruction": Haar at 19; see Lingis at 53.

[58] BGE 160, TI 101.

[59] BGE 203, 199; GM 225.

[60] GM 170.

Nietzsche counsels the promotion of one's self. The value of this egoism depends on the physiological value of the self, whether the self is on the ascending or descending line of life.[61] The self judges what it ought to do by the relationship of the action to will as instinct. The good heightens the feeling of power: an action compelled by the instinct of life has in the joy of performing it the proof that it is a right action.[62]

Nietzsche fearlessly follows his interpretation.[63] He sees what satisfies the lust for power, and christens it good--

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[61] TI 85.

[62] TI 115, 122: "Just where and how the line is to be drawn between the true and the false, the good and the bad, depends upon the kind of life these values uphold. They have no intrinsic value at all, their entire 'truth' lies in their adequation to a particular will to power": Haar at 16; see Gilles Deleuze, "Active and Reactive" in Allison, ed. 80 at 91.

[63] Prof. R. Burch suggests that the scope of permissible choices for Nietzsche's self is limited by a sort of "categorical imperative" imposed by the doctrine of the eternal return: "My doctrine teaches: live in such a way that you must desire to live again, this is your duty--you will live again in any case": from The Gay Science, quoted in P. Klossowski, "Nietzsche's Experience of the Eternal Return" in Allison, ed. 107 at 110; see Deleuze at 100: "The Eternal Return gives the will a rule as rigorous as the Kantian imperative....Whatever you will, will it in such a way that you also will its Eternal Return." The eternal return, though, solves no ethical problems for Nietzsche; it only repeats them. The passage from The Gay Science just quoted continues: "He to whom effort procures the loftiest feeling, let him make the effort; he to whom repose brings the loftiest feeling, let him rest; he to whom the act of joining, of following and of obeying procures the loftiest feeling, let him obey. Providing that he becomes aware of what procures the loftiest feeling and that he draws back before nothing...." The imperative, then, is not to will anything in particular, and not to refrain from willing anything in particular--it is to will whatever is to be willed in the proper manner (whether striving, resting, baking buns, or murdering); nothing is to be willed "halfheartedly": "But I tell you who are comfortable: it will take and will take more from you! Oh, that you would reject all halfhearted willing and would become resolute in sloth and deed": Zarathustra at 172.

cruelty, the pleasure of rape, the tyrannical, inconsiderate, relentless claims of power:

> No act of violence, rape, exploitation, destruction, is intrinsically "unjust", since life itself is violent, rapacious, exploitative and destructive and cannot be conceived otherwise.[64]

Were this not enough, Nietzsche also tells us about the "pale criminal":

> Thus speaks the red judge, "Why did this criminal murder? He wanted to rob." But I say unto you: his soul wanted blood, not robbery; he thirsted after the bliss of the knife. His poor reason, however, did not comprehend this madness and persuaded him: "What matters blood?" it asked; "don't you want at least to commit a robbery with it? To take revenge?" And he listened to his poor reason: its speech lay upon him like lead; so he robbed when he murdered. He did not want to be ashamed of his madness....
>
> Behold this poor body! What it suffered and coveted this poor soul interpreted for itself: it interpreted it as murderous lust and greed for the bliss of the knife.
>
> ... But what matter your good people to me? Much about your good people nauseates me; and verily, it is not their evil. Indeed, I wish they had a madness of which they might perish like this pale criminal.
>
> Verily, I wish their madness were called truth or loyalty or justice....[65]

One might wonder where conscience has gone. Nietzsche's selves have consciences. For Nietzsche, conscience is a result of sickness of self.[66] Instincts are denied play in the world and are interiorized. In lieu of assaulting the world, the will

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[64] GM at 208.

[65] Zarathustra at 39-40.

[66] GM 218, 217.

to power attacks the self. The self becomes an adventure, a territory to be conquered.[67] The self has a dual aspect. It is conqueror and conquered. The effort must be to bring the self into conformity with the demands of the will to power. The self is to be harmonized with the tone set by the will to power.

The being who can perceive what he or she ought to do, who is true to the will to power, is the "overman". The overman rises out of the herd, the mass of people.[68] The overman is a "genuine individual",[69] a person who has "found himself";[70] and finding oneself means attaining one's own standard of good and evil:

> Are you a new strength and a new right? A first movement? A self-propelled wheel? Can you compel the very stars to revolve around you.... Can you give yourself your own evil and your own good and hang your own will over yourself as law?[71]
>
> There it was too that I picked up the word "overman"...and that man is something that must be overcome--that man is a bridge and no end....[72]
>
> To redeem what is best in man and to recreate all "it was" until the will says, "Thus I willed it! Thus I shall will it."--This I called redemption and this alone I taught them to call redemption.[73]

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[67] ibid.

[68] Zarathustra at 62.

[69] Morgan at 200; "He is sovereign to himself; he is his own legislator, autonomous and supramoral": Lingis at 55.

[70] Morgan at 201.

[71] Zarathustra at 62-63.

[72] Zarathustra at 198.

[73] ibid.

Nietzsche does not say what the overman chooses as his or her good--Nietzsche cannot. The overman's choices are his or her own; the choices are not predictable, the choices are not stable: "All is freedom: you can, for you will;"[74] "Go your <u>own</u> ways!"[75] "Break, break the good and the just!"[76]

The overman is future, and the overman is past. Nietzsche sees a form of the overman, the prototype of the overman, in the past: "Whoever has gained wisdom concerning ancient origins will eventually look for wells of the future and for new origins."[77] In the past lived value creators. They were true to the will to power.[78] They were natural, noble beasts, persons who followed their instincts.[79] Their morality was defined by what they willed.[80]

These value creators forged polities. The strong dared to make promises. In contrast to them were the bad, those who did not keep their promises.[81] Nietzsche claims that the oldest and most primitive relationship between human beings is that of buyer and seller, or debtor and creditor, relations constituted by promises.[82] Polities were created by the promises made by the strong. When the strong encountered persons of lesser power, the strong imposed their will, imposing the polity, the rule of the strong, on the weak. When the strong encountered persons of

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[74] Zarathustra at 202.

[75] Zarathustra at 209.

[76] Zarathustra at 213.

[77] Zarathustra at 211.

[78] BGE at 203.

[79] BGE 199, 203.

[80] GM 160,162.

[81] GM 189.

[82] GM 202.

roughly equal power, the strong were forced to come to terms with the others, to strike compromises.[83]

Within the polities, the sources of rights were not natural law, but the deals or declarations of the powerful: "[Rights] arise by agreement, either as contract between approximate equals or as the grant of a higher power."[84] The creators made laws, which were imposed on or agreed to by societies.[85] The laws made by creators are not weapons to kill life. Laws are instruments in the struggle of power complexes.[86]

These polities had justice, meting equality for equals, and inequality for unequals.[87] This was not equality for all: injustice would have been treating a superior person in the same way as his or her inferior.[88]

Polities, formed by creators and their laws, do not exist for the common good. Political organizations are foundations for the growth of higher beings.[89] This involves the sacrifice of inferiors, the sacrifice of enormous numbers of persons for the sake of an aristocracy;[90] a people is nature's detour to six or seven great men.[91] Society leads to the overman: "The flock is means, no more!"[92]

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[83] GM 203.

[84] Morgan at 192.

[85] GM 206,207.

[86] GM 208; BGE 95; Morgan at 192.

[87] TI 102, AC 156.

[88] BGE at 155.

[89] BGE 200.

[90] BGE at 200.

[91] BGE at 81-82.

[92] in Morgan at 123.

Progressive political change--as opposed to decline--is fueled by the instincts. Laws are created by the strong, the natural; our institutions are revitalized by those powered by their instincts: "Our institutions are no longer fit for anything: everyone is unanimous about that. But the fault lies not in them but in us. Having lost all the instincts out of which institutions grow, we are losing the institutions themselves, because we are no longer fit for them".[93] The will to change the law is an "anti-liberal" will. It is the will of a person linked to life, to the instincts that shaped the society. It is the will to tradition, authority, and centuries-long responsibility.[94] Ultimately, it is the will to life, the will to power.

If we follow Nietzsche, civil disobedience is understood in terms of progressive political change. The disobedient are fueled by instinct. They assert the will of the society whose laws they challenge. Not the disobedient, but the authorities who have permitted the institutions to decay are the true malefactors. The disobedient are beyond moral criticism. Their action is good, as an assertion of the will of their society.

2.2-civil disobedience after Nietzsche

Nietzsche, so far as I know, said nothing directly about civil disobedience. Civil disobedience as Nietzsche's progressive political change is an extrapolation. But I am not the only one to use Nietzsche, or Nietzschean ideas, to explain civil disobedience. Hannah Arendt and John Rawls are both in the tradition of the Nietzschean interpretation of civil disobedience. Arendt's affinity with Nietzsche and Nietzschean ideas is not surprising, given her background in the German

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[93] TI 93.

[94] ibid.

philosophical tradition.[95] My linking of Rawls to Nietzsche might seem fantastic. I do not say that all of Rawls' thought on civil disobedience is Nietzschean. A good part--the best part--is not. Yet Rawls' justification of civil disobedience, and some features of his account of civil disobedience resemble Arendt's account, and betray a Nietzschean genealogy. The ideological connection between Rawls and Nietzsche is made not because Rawls consciously follows Nietzsche, but because he and Nietzsche are both part of a broader philosophical school, the school of value as will, of which Nietzsche is the culmination, and because Nietzsche's ideas or their American translations are diffused in the atmosphere of American political thought.[96]

Like Nietzsche, Arendt and Rawls devalue morality. Unlike Nietzsche, both Arendt and Rawls do not devalue all ordinary morality. Both Arendt and Rawls are partial relativists.

Arendt's partial relativism appears in her attack on the traditional notion of conscience. Arendt declares that conscience is governed by self-interest; it yields only relativistic judgments, and, moreover, it is not even present in common people.[97] Arendt's fixing of conscience in self-interest

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[95] "This image can be seen in our intellectual history, if only one substitutes Mary McCarthy for Louis Armstrong and Hannah Arendt for Lotte Lenya, or David Riesman for Armstrong and Erich Fromm for Lenya, and so on through the honour roll of American intellectuals. Our stars are singing a song they do not understand, translated from a German original and having a huge popular success with unknown but wide-ranging consequences, as something of the original message touches something in American souls. But behind it all, the master lyricists are Nietzsche and Heidegger": Bloom at 152.

[96] see Bloom, Part II.

[97] "The validity of the Socratic propositions depends upon the kind of man who utters them and the kind of man to whom they are addressed. They are self-evident truths for man insofar as he is a thinking being; to those who don't think, who don't have intercourse with themselves, they are not self-evident, nor can they be proved. Those men--and they are the 'multitudes'--can gain a proper interest in themselves only, according to Plato, by

requires the death of God. Arendt refers to traditional notions of conscience as "the voice of God" or as the "lumen naturale" informing men of a higher law, notions of conscience as a link with truth.[98] She does not show that these notions are wrong. Apparently, they are out of fashion. We now live in a "secular age."[99] The only argumentative gesture she makes against these notions is an appeal to fear, our good relativistic fear of "absolutism":[100]

> To modern ears, this [conscience] must sound like "self-certification" which "borders on blasphemy" - the presumptuous pretension that one knows the will of God and is sure of his eventual justification".[101]

Rawls' partial relativism appears in his account of the good. The good, for Rawls, is a subordinated conception. Rawls asserts that teleological doctrines of the good are misconceived;

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believing in a mythical hereafter with rewards and punishments": Hannah Arendt, "Civil Disobedience" in Crises of the Republic (New York: Harvest/HBJ Books, 1972) at 63-64.

[98] Arendt at 65

[99] Arendt at 65,67.

[100] "The danger they have been taught to fear from absolutism is not error but intolerance. Relativism is necessary to openness; and this is the virtue, the only virtue, which all primary education for more than fifty years had dedicated itself to inculcating. Openness--and the relativism that makes it the only plausible stance in the face of various claims to truth and various ways of life and kinds of human beings--is the great insight of our times. The true believer is the real danger. The study of history and culture teaches that all the world was mad in the past; men always thought they were right, and that led to wars, persecutions, slavery, xenophobia, racism and chauvinism. The point is not to correct the mistakes and really be right; rather it is not to think you are right at all": Bloom at 25-26.

[101] Arendt at 66, referring to Leslie Dunbar, quoted by P. F. Power, "On Civil Disobedience in Recent American Democratic Thought" (1970) American Political Science Review.

the good is not independently defined.[102] Rather, the good is only that which satisfies rational desire.[103] What satisfies rational desire is that which is rationally desirable as a means to achieve a person's rational plan of life.[104] Persons may have many possible rational plans of life.[105] Rawls denies that persons have any single or dominant aim.[106] If a person satisfies background conditions for selecting a plan of life, any chosen rational plan of life is as valid as any other.[107] The good varies with the multiplicity of rational plans of life.[108] The good is purely functional; it leads to desired ends. Rawls strives for a "morally neutral" definition of the good:[109]

> Thus imagine someone whose only pleasure is to count blades of grass in various geometrically shaped areas such as park squares and well-trimmed lawns....The definition of the good forces us to admit that the good for this man is indeed counting blades of grass, or more accurately, his good is determined by a plan that gives an especially prominent place to this activity....if we allow that his nature is to enjoy this activity and not to enjoy any

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[102] Rawls at 93. Dworkin too rejects teleology: Dworkin at 169. The teleology that Dworkin rejects, though, is of a fairly slanted, superficial variety. Dworkin considers teleological theories to promote goals, or policies, which are "non-individuated political aims": Dworkin at 90-91. Such goals are altars at which individual rights are sacrificed: Dworkin at 172. That may be a fair approach to crude utilitarianism, but it is entirely the wrong approach to classical moral teleology.

[103] Rawls at 93.

[104] Rawls at 42, 315, 399, 421, 424.

[105] Rawls at 401.

[106] Rawls at 560, 424, 429, 447, 563.

[107] Rawls at 429.

[108] ibid.

[109] Rawls at 404.

> other, and that there is no feasible way to alter his condition, then surely a rational plan for him will centre around this activity. It will be for him the end that regulates the schedule of his actions, and this establishes that it is good for him.[110]

Rawls' great fear, like that of Arendt, is "absolutism". For Rawls, the assertion of a dominant aim for human existence manifests fanaticism and inhumanity.[111] To subordinate human activity to one end is irrational, or more likely mad.[112]

For Arendt and Rawls, as for Nietzsche, the source of value is the will. Neither puts her or his position that starkly, but I submit that this conclusion is fair nonetheless.

Arendt is less forthright than Rawls. She claims that she is unconcerned with the content of person's opinions. For her, the source of value is free choice, the act of will, which issues in agreement and association. Thus, she attempts to account for civil disobedience as a form of voluntary association. Voluntary association is the source of the value of civil disobedience. She implies this by linking voluntary association with the fundamental moral and constitutional principles of the United States: "civil disobedience is compatible with the spirit of American laws...."[113]; "It is my contention that civil disobedient are nothing but the latest form of voluntary association, and that they are thus quite in tune with the oldest traditions of the country."[114] She refers to the right of association (i.e., in her interpretation, the right of voluntary association) as "this precious privilege whose exercise has in fact been (as Tocqueville noted) 'incorporated with the manners and customs of

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[110] Rawls at 432-433.

[111] Rawls at 554.

[112] ibid.

[113] Arendt at 99.

[114] Arendt at 96.

the people' for centuries."[115] "This precious privilege": this is the language of value. Arendt had tried to chase value away, but here it is. The principle of association is for her a valuable political principle.[116]

Rawls is explicit about the sources of value. Value arises from will, from choice. Rawls is, after all, a contract theorist. The original position is a position of choice. The justification of social principles is that they would have been chosen in the original position.[117] Rawls seeks to maximize the scope of persons' wills. He promotes liberty. The original position is to provide the set of conditions so that each may fashion his or her own liberty, manifest his or her freedom.[118] Rawls champions autonomy. He wants persons to follow the law that they give themselves; he quotes Rousseau: "to be governed by appetite alone is slavery, while obedience to a law one prescribes oneself is freedom."[119]

Since Arendt and Rawls focus their interpretations of value on the will, they are naturally drawn to the immediate medium of will, the self. While Arendt and Rawls follow a broadly

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[115] Arendt at 101.

[116] Michael Walzer sets out in the daylight the position Arendt only grudgingly discloses, that moral obligations issue only from our wilful undertakings to and with other people: Obligations: Essays on Disobedience, War and Citizenship (New York: Simon and Schuster, 1970) viii, 7, 9. For Walzer, the motivation for civil disobedience stems from the duty of the disobedient owed to secondary associations of which they are members, where those associations assert claims to primacy over the claims of the primary association of which the disobedient are also members, the State: Walzer at 10. Walzer confesses allegiance to the value as will relativist creed: moral life, he says, is unavoidably pluralistic; the State must recognize the pluralism of our various moral commitments: Walzer at 15, 42.

[117] Rawls at 11, 42.

[118] Rawls at 564, 256.

[119] Rawls at 264 n. 4; see 256.

Nietzschean approach to the self, unlike Nietzsche, they stop with the self. They do not move beyond the human to an overman.

Nietzsche's self is an occupied territory, implying occupier and occupied. This dualistic self is reflected in Arendt's "secular conscience," which replaced (when?) the traditional conscience which is (somehow) just thinking.[120] The secular conscience is an internal dialogue,[121] "this knowing, and speaking with, myself...."[122] To maintain the dialogue, the partners (me and myself)[123] must be "friends".[124] To maintain the dialogue, a person must not do anything to offend his partner, himself: "Beware of doing something that you will not be able to live with";[125] "The fear of being alone and having to face oneself can be a very effective dissuader from wrongdoing."[126] "Hence", claims Arendt, "the rules of conscience hinge on interest in the self."[127] The demand of conscience is the demand for conformity with a chosen life-style.

In Rawls, the Nietzschean image of the conquered self is tamed into the primal value of "self-esteem".[128] For Nietzsche, the self was a territory to be conquered; for Rawls the goal is

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[120] Arendt at 63,65.

[121] Arendt at 63.

[122] Arendt at 67.

[123] Arendt at 84.

[124] Arendt at 63.

[125] Arendt at 64.

[126] Arendt at 67.

[127] Arendt at 64.

[128] One might say that Rawls attempts to give philosophical substance to the first branch of the transactional analysis dictum "I'm O.K., you're O.K."

to be happy with oneself, to be free from shame and regret.[129] Rawls' emphasis on the self is clear: "the self is prior to the ends which are affirmed by it".[130] The self chooses the plans of life, from which the good may be extracted. Rawls' emphasis on self-esteem is overpowering; it is a primary good, perhaps the most important of these.[131] Rawls combats shame, the feeling of diminishment of self, of wounded self-respect.[132] He battles envy, which is rooted in a lack of self-confidence, the sense of impotence, a way of life without zest.[133] Rawls confronts evil men, who deny the self-respect of others, who delight in others' impotence, and who attempt to degrade others.[134]

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[129] Rawls at 548, 422; "all actions are innocent; repentance is irrational. Nietzsche speaks of the new sense of innocence": Morgan at 174.

[130] Rawls at 560.

[131] Rawls at 396, 178, 256, 440, 444.

[132] Rawls at 455.

[133] Rawls at 539.

[134] Rawls at 439. I object to Rawls'and Dworkin's focus on "self-esteem". This focus both trivializes and endangers social life. It trivializes problems, by suggesting that solutions to political and social problems are psychological. All could be resolved, were everyone adjusted to his or her condition, and if everyone were accepted for what he or she is. It endangers social life by suggesting that material conditions of existence are not key, only feelings of self-satisfaction need be promoted. Talk of "dignity" and "self-esteem" is too abstract. We should not begin by promoting "dignity" and "self-esteem": we should begin by ensuring that all people have food, clothing, and shelter, access to decent education and decent work. If these things are available to people, then they will be treated with dignity, they will have self-esteem. Dignity and self-esteem without the means for a free and decent life is the dignity and self-esteem of happily drugged slaves. I recognize that love and acceptance are important for people; without love and acceptance, people may not fruitfully use means made available to them. But love and acceptance must be coupled with material and intellectual empowerment, or love and acceptance are only a form of repression.

Rawls connects his account of civil disobedience to self-esteem. Civil disobedience is a form of self expression. Through it, the disobedient declare their considered opinions.[135] If civil disobedience were not tolerated, the self-esteem of the disobedient would be denied.[136] A society whose members have a general disposition to engage in justified civil disobedience have strengthened self-esteem and respect for one another.[137]

In his efforts to ensure that all of the disobedient get a chance to feel good about themselves, Rawls offers a plan which even he describes as "completely unrealistic", but which he nevertheless thinks is a possibility, given proper leadership. The problem is that we have (or should have) many groups of the disobedient groups. They cannot all be disobedient at once. Their disobedience would jam the public forum. Hence,[138] various civil disobedient groups (including, I suppose, the NAACP and the Klansmen, pro-life activists and pro-choice proponents, save the environment groups and save our jobs groups) should enter a cooperative political alliance, to regulate the overall level of dissent, and to ensure that all positions are equitably

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[135] Rawls at 366.

[136] Dworkin echoes Rawls' binding of civil disobedience to self-esteem. Dworkin speaks of persons' right to equal "concern and respect", and talks of the respect and dignity adult members of our community claim from one another: Dworkin at 180, 11; see 198. If the disobedient are not permitted to vent their feelings in the way they desire, the disobedient are "insulted": Dworkin at 202. The dignity of the disobedient requires broad freedom of expression: Dworkin at 206. If society tries to regulate public displays, society "arrogantly" assumes that "orthodox methods of expression" are the proper ways to speak: ibid. Dworkin maligns the "silent majority" in this context: ibid. I believe John Lennon got into trouble once for engaging in a public "love in" with Yoko Ono. I guess all the arrogant moralists should have kept their "orthodox" opinions to themselves, permitted casual sex on the street, and stopped hurting John's feelings.

[137] Rawls at 383-384.

[138] as Dave Barry says, I am not making this up.

considered.[139]

Arendt and Rawls' free-willing selves are driven into mutual arrangements. The selves exchange promises. They contract with one another. Arendt praises voluntary association. Rawls champions the social contract interpreted as the original position. Arendt and Rawls differ with Nietzsche on the tone of these arrangements. For Nietzsche, these arrangements are the resultants of force matched against force. In Arendt and Rawls, this essential conflict between persons is absent.

Rawls' persons do not exist just to contract with one another. For us to have self-respect, we must be respected by others; we need others; we need esteem. Rawls wishes people to appreciate one another, and to confirm each other in their chosen plans of life. We cannot withstand the indifference or contempt of others: indifference and contempt cause us pain, cause us to feel that our natures are blunted.[140] We should not have to worry that others might find us contemptible, objects of ridicule.[141]

Arendt and Rawls' selves, with Nietzsche's selves, contract themselves into political organizations. Arendt focuses on persons' will to promise:

> Every organization of men, be it social or political, ultimately relies on man's capacity for making promises and keeping them.... The only obligation which I as a citizen have a right to assume is to make and to keep promises.[142]

Through the exchange of promises, Arendt's selves constitute themselves into voluntary associations.[143] These selves may grow

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[139] Rawls at 374-375.

[140] Rawls at 178, 440, 338, 501, 338, 460.

[141] Rawls at 445.

[142] Arendt at 92.

[143] Arendt at 96,98,99.

dissatisfied with their political organizations, and may seek political change. Those who desire change constitute themselves into dissenting organized minorities,[144] groups of the civilly disobedient.[145]

For both Arendt and Rawls, civil disobedience is not based on interpersonally valid morality. This follows from their partial relativism. Arendt is not concerned with the content of opinions held by the civilly disobedient: agreement, association is the source of political worth. Arendt claims that conscience breeds only personal preferences; moral relativism rules:

> What I cannot live with may not bother another man's conscience. The result is that conscience will stand against conscience. "If the decision to break the law really turned on individual conscience, it is hard to see in law how Dr. King is better off than Governor Ross Barnett, of Mississippi, who also believed deeply in his cause and was willing to go to jail."[146]

Such conscience is (or perhaps she means ought to be) "unpolitical":

> It is not primarily interested in the world where the wrong is committed or in the consequences that the wrong will have for the future course of the world.[147]

Conscience cannot make political judgments:

> Arguments raised in defense of individual conscience or individual acts, that is, moral imperatives and appeals to a "higher law", be it secular or transcendent, are inadequate when applied to civil disobedience; on this level, it will be not only "difficult," but impossible "to keep civil disobedience from being a philosophy of subjectivity... intensely and exclusively personal, so that

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[144] Arendt at 98.

[145] Arendt at 99, 55, 56.

[146] Arendt at 64.

[147] Arendt at 60.

> any individual, for whatever reason, can disobey.[148]

She claims that

> The counsels of conscience are not only unpolitical; they are always expressed in purely subjective statements.[149]

She enlists Socrates:

> When Socrates stated that "it is better to suffer wrong than to do wrong," he clearly meant that it was better <u>for him</u>, just as it was better for him "to be in disagreement than, being one, to be in disagreement with [himself]."[150]

Rawls tells the civilly disobedient not to appeal to principles of personal morality or to religious doctrines.[151] Rawls does not wish civil disobedience to have a "sectarian" foundation.[152] Rawls therefore makes efforts to distinguish civil disobedience from conscientious refusal, which may be based on morality or religion,[153] and militancy, which may contest the entire moral foundation of a society.[154]

Like Nietzsche, both Arendt and Rawls link the justification of political change to the non-moral bases of the social constitution.

Arendt describes civil disobedience as a valued feature of American political life. Because civil disobedience expresses

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[148] Arendt at 56-57, quoting from Nicholas W. Puner, "Civil Disobedience: An Analysis and Rationale" (1968) 43 N.Y. Law Rev. at 714.

[149] Arendt at 62.

[150] Arendt at 62, quoting from <u>Gorgias</u>.

[151] Rawls at 365.

[152] Rawls at 385.

[153] Rawls at 368, 369, 371.

[154] Rawls at 367.

the spirit of good political institutions, it ought to be supported by American political institutions:

> The establishment of civil disobedience among our political institutions might be the best possible remedy for this ultimate failure of judicial review.... The next step would be to admit publicly that the First Amendment neither in language nor in spirit covers the right of association as it is actually practised in this country - this precious privilege whose exercise has in fact been (as Tocqueville noted) "incorporated with the manners and customs of the people" for centuries. If there is anything that urgently requires a new constitutional amendment and is worth all the trouble that goes with it, it is certainly this.[155]

Rawls' civil disobedience too appeals to political principles, the principles of social cooperation of the political organization.[156]

Since Arendt and Rawls' civilly disobedient act according to their wills, and since they confirm the spirit of the institutions of their political organizations, they should be tolerated; they should not be punished. Arendt suggests that civil disobedience should be constitutionally protected.[157] Civil disobedience ought to be permitted and regulated, like lobbying.[158]

Rawls does not go quite so far as Arendt. He admits that civil disobedience is, strictly speaking, contrary to law.[159] Rawls does not demand a constitutional amendment immunizing the disobedient from prosecutions, but he does submit that Courts should take into consideration the nature of disobedience in

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[155] Arendt at 101.

[156] Rawls at 365, 366, 386.

[157] Arendt at 83, 99, 101.

[158] Arendt at 101.

[159] Rawls at 384.

sentencing.[160] Rawls wants to supplement the purely legal conception of constitutional democracy.[161] He describes civil disobedience as a sort of illegal but necessary constitutional device, taking a place beside free and regular elections and the judiciary as a stabilizing device for a constitutional system.[162]

Rawls, like Nietzsche, shifts the responsibility for civil disobedience onto the authorities, who have failed to conduct the political organization according to its first principles: "the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition."[163]

2.3-the response to Nietzsche and the Nietzschean positions

How do I answer Nietzsche's objection to my project of moral evaluation of civil disobedience, flanked as Nietzsche is by Arendt and Rawls?[164]

I can respond to Nietzsche in four ways, the ways of response to the moral skeptic. Nietzsche is better placed than the moral skeptic to resist my charges.

First, I might claim that some moral truths are indubitable. This will not be a successful attack. Nietzsche makes a powerful case that evil is good, and good evil. If we do not doubt our

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[160] Rawls at 385; a reasonable submission.

[161] Rawls at 385.

[162] Rawls at 383.

[163] Rawls at 391.

[164] I have one quibble with Nietzsche. He teaches us the overman, yet we are victims of fate: "The fatality of his nature cannot be disentangled from the fatality of all that which has been and will be:" TI at 54. How can we leave our slave morality, if that is our fate? Nietzsche does not try to account for free will in determinism. But then, neither have thinkers from the Stoics to the Marxists. Perhaps Nietzsche's position is the answer: we determined but we are free, too--we live that contradiction. This problem is not central to my investigation.

morality after reading Nietzsche, or if we do not at least feel less morally secure, we have not read him with an open mind.

Second, I might claim that Nietzsche somehow misuses moral language. By interpreting evil as good and good as evil, Nietzsche has wrested our moral words from their proper contexts, and the words have left their sense behind them. This sort of argument has some merit when used against the skeptic. But Nietzsche does not go as far as the skeptic. He moves our words into consciously new, but not essentially new territory. That is, Nietzsche's use of moral terms is not exactly like the ordinary use of moral terms. His use of moral terms, though, is not without precedent in our lives; and part of Nietzsche's point is that his moral language is not so very different from the moral language that goes on inside of each of us, even if we do not care to admit it. The pale criminal is not, entirely, a stranger.[165] Nietzsche does use moral language in a context that is not the normal context, but it is a context, and Nietzsche, if nothing else, is intelligible.

The operational inconsistency argument is even less successful against Nietzsche. This argument had a grip on the skeptic because the skeptic seeks to get outside all contexts, to judge that morality does not exist, without admitting any moral knowledge. Nietzsche does not deny all morality. He contrasts our everyday slave morality with life founded on the true source of value, the value of will. Nietzsche has a fixed point from which to lever morality.

I am left with a response to Nietzsche similar to my fourth response to the moral skeptic. Nietzsche's position is an

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[165] While Nietzsche's conviction that he was speaking from the most hidden knowledge of others may have slackened, part of the allure of Nietzsche is that even when he speaks of what we are not, we recognize the shape of what we are not in ourselves. Nietzsche, as much as Freud, was "speaking from the most hidden knowledge of others". To this extent, I differ with one of Cavell's comments on Nietzsche: The Claim of Reason at 109.

interpretation, and not the exclusive interpretation of morality. I do not accept that interpretation, because if I were to do so, I would be denying my humanity.

Now that sounds like an exaggeration. I can read Nietzsche without growing hair on my palms, baying at the moon, or lusting for blood. But can I become a truly consistent Nietzschean, and still be a person?

Nietzsche, I submit, did not think so. The overman is the consistent Nietzschean. Haar defines the problem of the overman:

> One question is of utmost importance: are we to interpret the Overman to be some sort of highest type of man, the perfect embodiment of the essence of man...--or are we to interpret the Overman in a much different way--as a species higher than man...and...as some living being beyond man?[166]

Haar concludes that the overman is "as different from man as man is from the animals": "...the Overman does not fulfil humanity but rather that which, in humanity, is more originary than humanity--namely, the Will to Power: the Overman is the fulfilment not of the essence of man, but of the essence of life."[167] The texts support Haar. Zarathustra says that "man is something that must be overcome--that man is a bridge and no end."[168] In the Foreword to the Antichrist, Nietzsche writes

> This book belongs to the very few. Perhaps none of them is living yet....An experience out of seven solitudes. New ears for new music. New eyes for the most distant things. A new conscience for truths which have hitherto remained dumb....These alone are my readers...what do the rest matter?--The rest are merely mankind.[169]

Certainly cruelty, the lust for power, carelessness,

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[166] Haar at 25.

[167] Haar at 26.

[168] Zarathustra at 198.

[169] AC at 114.

selfishness, are all ordinary human qualities. We contrast these with other human qualities, such as concern for neighbour, cooperation, accommodation. For the overman, the contrast vanishes; what he is is what he does, and he can do anything. He is beyond good and evil. The overman would not, or at least need not, respond to the world like ordinary persons. This is the reverse of the problem of other minds; rather than considering others to be mobile statues or animated dolls, creatures who do not express humanity,[170] we are to consider ourselves as failing to have ordinary thoughts, emotions, desires. What sort of creature would we be? We humans can stretch our minds towards the overman. That is a marvel. And that is why we can understand Nietzsche. Could we become the overman? Could we, somehow, get beyond good and evil? If we became the overman, if we could think like him, could we still be human? If being human means that we ordinarily experience life through some form of "slave morality", adjusted for differences of culture, and I suggest that this is part of being human, then the overman is not human. If we could become the overman, we would not be human. The closer we get to the overman, the less human we are. Therefore, I say that we cannot accept Nietzsche's theory of value as will, and his (extrapolated) theory of civil disobedience, because to do so would violate our humanity.

A distinction must be made between Nietzsche's account of the will, and his attribution of value to the will. I have rejected the will as the source of value. Whether Nietzsche's account of the will is accurate depends on the facts of human life. Is the will the way Nietzsche describes it? Is our will at one with the will of the pale criminal, does it tend toward the overman? I submit that anyone who has not slept through the twentieth century would accept Nietzsche's account of the way we are when governed by our will alone: think of Auschwitz, the

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[170] Cook at 121.

Southern United States before the mid-nineteen sixties, South Africa, village massacres in India, Stalin's purges, Pol Pot's reign of terror, the disappeared in Latin America. These are only quantitatively extraordinary instances. Too often we see lust for the knife. This lust is human, all too human.[171] But this lust is not all there is to being human. My position is that there is more to humanity than action by will. As natural--more natural--for humans than the lust for the knife is the moral response to other persons. The human form of life is, at bottom, moral. That is why Nietzsche's value as will theory cannot be accepted.

My concerns with Arendt and Rawls do not run so deep.

The fundamental difference between Nietzsche and Arendt and Rawls is that Arendt and Rawls attempt to prevent the pale criminal within the self from escaping. Arendt and Rawls do not teach the overman.

Arendt's efforts to contain the pale criminal are not successful. Arendt justifies civil disobedience as voluntary association. She attempts, by semantic association (this "precious privilege") to clothe voluntary association in the garb of American values. She gives no reason for arresting the will to power in 1776. Her problem is this: if (purportedly) non-moral voluntary association is the source of the value of civil disobedience, so long as groups are voluntarily associating, their activities are of equal value--whether the groups are the Ku Klux Klan, the Aryan Order, or the Friends of the Earth. Arendt parenthetically quotes Kant: "even 'a race of devils' could successfully solve the problem of establishing a

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[171] "We have no need of monsters: ordinary policemen and good citizens will take care of everything"; "The demonic sickness of Auschwitz emanated from ordinary people, stimulated by an extraordinary regime. The trial brought out their variety, their ordinariness, their shades of character, and even their capacity of change": Thomas Merton, "Auschwitz: A Family Camp" in The Nonviolent Alternative (New York: Farrar, Straus, Giroux, 1980) 150 at 154, 156.

constitution, 'if only they are intelligent'."[172] Surely we need a political theory that stops the devil from emerging and organizing. For Arendt, so long as devils voluntarily associate, we cannot criticize.

Rawls acknowledges the danger identified by and in Kant. Rawls refers to Sidgwick's comments on Kant:

> It seems to [Sidgwick] that on Kant's view the lives of the saint and the scoundrel are equally the outcome of free choice....Kant never explains why the scoundrel does not express in a bad life his characteristic and freely chosen self-hood in the same way that a saint expresses his characteristic and freely chosen self-hood in a good one.[173]

Rawls, however, seeks to render the indeterminacy "innocuous"; Rawls thinks that he can make good the defect.[174] The defect is made good by the original position.

Generally, the original position is to be a mechanism whereby free individuals, through their choice and agreement, may fashion a social and political organization which preserves and promotes decent ways of life. I support Rawls' project. Rawls' problem is whether his value as will moral presupposition will restrict ways of life to decent ways of life, whether selves operating under the value as will theory could come together and produce a decent society.

I submit that these selves could not do so, and Rawls could not produce decency, if Rawls had not ignored aspects of the self, and had not introduced constraints foreign to the interpretation of value as will.

Rawls ignores the pale criminal. Rawls talks of nothing but rational utility maximization. I do not dispute that we may be, in part, rational utility maximizers (some of us more than

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[172] Arendt at 62.

[173] Rawls at 254-255.

[174] Rawls at 564, 255.

others). One of the other parts concerns me. Rawls has not shown that Nietzsche's psychology of the pale criminal is wrong; and as I indicated above, we have plenty of twentieth century evidence that Nietzsche is right. The hidden danger in Rawls' theory is that he turns the source of moral value over to the self as will. If people are told enough times that they are the source of value, they may start acting as if they are. If they do so, I question, as a matter of fact, whether our institutions can withstand the barbarian within.[175] Rawls may be setting in motion forces he cannot control.

Rawls obtains the constraints he imposes on the will from outside of his value as will theory. He has two types of constraints, psychological and moral.

Rawls' psychological constraints are what I might call the will to sociability. Rawls' selves do not only wish to express themselves as free, but also as equal.[176] Rawls' selves are also "presumed to act justly" and to do their part in upholding just institutions.[177] Rawls' selves take pleasure in one another's activities.[178] We may sometimes exhibit these symptoms. Again, my worry is that if we start to rely on human psychology, we will be faced with the Nietzschean beast, and not the Rawlsian rational person. Furthermore, even if our psychology were (dominantly) as Rawls claims, that would not entail that those ways of behaving had moral value.

Rawls' moral constraints are imposed by the veil of

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[175] David Gauthier writes "reason is insufficient in practice to overcome the motivations which, on the contractarian view, direct our actions. Awareness of oneself as an appropriator undercuts one's willingness to accept the constraints of the political order": "The Social Contract as Ideology" Philosophy and Public Affairs, offprint, 130 at 160.

[176] Rawls at 255, 256.

[177] Rawls at 8, 176.

[178] Rawls at 448.

ignorance. Rawls' selves are to be considered in a situation where none knows his or her place in society (class or social status), distribution of natural assets and abilities, intelligence, strength, or conceptions of the good.[179] The veil of ignorance is to nullify the effects of contingency. But why is the original position, covered by the veil of ignorance, fair? Nietzsche would say that it is exactly unfair, because it treats superior persons like inferior persons. Why does the veil of ignorance prevent consideration of moral irrelevancies? What is the criterion for distinguishing contingencies from what is properly moral? Why should the original position be so tolerant that it excludes from consideration even conceptions of the good?[180] I do not dispute that, for the most part, the amnesia Rawls imposes on selves in the original position is a fair amnesia; but can any of my questions be answered by reference to the value as will theory?

I submit that they cannot. Nagel has identified Rawls' difficulty:

> Suppose Rawls is right about what it would be rational to choose under [the] conditions [of the original position]. We must then ask why a unanimous choice under conditions of ignorance, without an assumption that one has an equal chance of being anyone in the society, correctly expresses the constraints of morality....What makes these conditions of unanimity under ignorance the right ones? They insure that numbers do not count and urgency does, but that is the issue. A more fundamental type of argument is needed to settle it.[181]

...the presumptions of the contract method

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[179] Rawls at 12, 18, 19, 136.

[180] This is Thomas Nagel's query: "Rawls on Justice" in N. Daniels, ed. Reading Rawls (New York: Basic Books, Inc.) 1 at 8.

[181] Thomas Nagel, "Equality" in Mortal Questions (New York: Cambridge University Press, 1980) 106 at 121-122.

> Rawls employs are rather strong, and...the original position therefore offers less independent support to his conclusions than at first appears. The egalitarian liberalism which he develops and the conception of the good on which it depends are extremely persuasive, but the original position serves to model rather than to justify them.[182]

In my view, Rawls does provide a form of a "more fundamental type of argument"; his value as will theory. Will itself, though, does not contain any inherent restrictions on will. This is why the pale criminal and the overman follow from the value as will theory. To add the constraints that Rawls needs to render choice innocuous, and to correct the moral defects of the will, Rawls assumes, without justification, an additional moral theory.

Rawls' theory is impure, and incorporates at a decisive juncture assumptions that are arbitrary additions to his theory. I agree with much that Rawls says about politics and society. But the basis of my agreement is my sharing with Rawls the principles that Rawls arbitrarily assumes. I submit that we had better jettison the whole value as will theory, and the theory of civil disobedience it spawns. In the following Chapter, I commence the reconstruction of a moral theory, which will be the foundation for my account of civil disobedience.

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[182] "Rawls on Justice" at 15. Dworkin makes, in effect, a similar point, by claiming that the original position is but a device to call attention to an independent argument for the fairness of Rawls' position: Dworkin at 152. Dworkin identifies what he call Rawls' deep theory, which underlies the original position: Dworkin at 178. Again, in effect, Nagel's point, my point, and Dworkin's point are the same--the original position presupposes another moral theory.

CHAPTER 3: THE MORAL

I fought against Nietzsche's interpretation of value as will. Value as will is not the standard by which civil disobedience is to be evaluated. If I am to be able to provide a moral evaluation of civil disobedience, and if I am to be able to provide an account of the moral motivations of the disobedient, I must provide an account of the moral. In this Chapter, I provide an interpretation of the moral, consider how we are able to apply the moral as interpreted, and consider the determination of morality by action in moral consensus.

3.1-the interpretation

Before providing my interpretation of the good or the moral, I must deal with two questions. First, is a teleological interpretation inferior to a deontological interpretation of the good or the moral? Second, is a metaphysically oriented teleological interpretation inferior to a "constructivist" interpretation of the good or the moral?

Dworkin advocates a deontological rather than a teleological theory of rights. Rights are self-evident.[183] Dworkin joined the deontological camp because he fears teleological theories. These are concerned with goals, "non-individuated political aims", and are "concerned with the welfare of particular individuals only insofar as this contributes to some state of affairs stipulated as good quite apart from his choice of that state of affairs".[184]

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[183] Dworkin at 252, 169.

[184] Dworkin at 172. Regrettably, Dworkin makes little reference to the classical philosophical tradition of teleological theory. The teleology which he attacks is described, on the one hand, only abstractly--supporting the interpretation that this teleology is a creature of his own imagination; and, on the other hand, by slanted illustration, designed to infect teleology by verbal association. The quotation just provided is followed immediately by the following illustration: "This is plainly true

The sort of teleology I have in mind is not "[a]nti-individualistic...[stressing] the importance of the State and [accepting] the individual only in so far as his interests coincide with those of the State...."[185] I does not support Dworkin's fears. They do not force theory to be deontological to maintain a place for individual rights.

Furthermore, teleological theory, if morally sound, is superior to deontological theory because it provides additional explanation for our intuitions of the good.

A teleological interpretation of the good or the moral is not inferior to a deontological interpretation.

Dworkin, without argument and without any reference to the philosophical tradition, seeks to discredit metaphysically-oriented moral theories (again) stylistically, by describing natural rights theories as "spooky" and as "nonsense".[186] He opposes metaphysically-oriented theories with his "constructivist" theory. This is a coherence theory of morality.[187] Dworkin borrows the reflective equilibrium technique from Rawls. Dworkin says that our considered convictions (intuitions of justice) are but "stipulated features" of a general theory, which is to be constructed by reference to these features.[188] The theorist is to determine principles which

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of totalitarian goal-based theories, like fascism, that take the interest of a political organization as fundamental."

[185] Mussolini (ghost-written by Giovanni Gentile), "Fascist Doctrine as Presented Officially by Mussolini, June 1932" in S. William Halperin, Mussolini and Italian Fascism (Toronto: D. Van Nostrand Co., 1964) at 146. A game that has been played by theorists since World War II is figuring out ways of calling opponents fascists. Von Hayek so labels socialists; Marcuse so labels free-market conservatives.

[186] Dworkin at 139 and 216.

[187] Dworkin at 160.

[188] Dworkin at 160.

account for the intuitions.

Intuitions may be inconsistent with a constructed theory. A natural law theory supports a policy of following the troublesome intuitions, and submerging the apparent contradiction, in the faith that a more sophisticated set of principles, which reconciles that intuition does if fact exist though it has not been discovered.[189] A constructivist theory is willing to sacrifice particular intuitions for the sake of the theory: "we act on principle rather than on faith"; "articulated consistency...is essential to any conception of justice".[190] Dworkin adds that his theory does not presuppose skepticism or relativism.[191]

Dworkin is inconsistent. He talks of constructivism; but when he talks about the basis of justice, "Rawls' deep theory", he speaks of a theory "that is based on the concepts of rights that are natural, in the sense that they are not the product of any legislation, or convention, or hypothetical contract."[192] Dworkin immediately retreats from this admission, quoting Mr. Justice Black's description of natural rights as "this preposterous notion"; and Dworkin alleges that on his theory, "the assumption of natural rights is not a metaphysically ambitious one."[193]

Dworkin's problem is this: either some rights are natural, in the sense that they are not "corrigible" by any set of principles, despite all the demands of coherence, or no such

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[189] Dworkin at 161; slanting again: the slanting is followed by a slanted illustration; the natural law theorist is compared to a faith-full astronomer. I assume that the Ptolemaic astronomers are connoted.

[190] Dworkin at 162.

[191] ibid.

[192] Dworkin at 176.

[193] Dworkin at 177.

rights exist. If no such rights exist, how can we "take rights seriously?" How could we ever know what rights any judge would respect (in any hard case)? Why should we think that two or more individuals would come to the same coherent set of principles and acceptable moral intuitions? Why should any one theory be judged to be correct? Coherence theory, unanchored to incorrigible judgments of the good, drifts into solipsistic relativism. Dworkin can say he is only "assuming" "natural rights"; the assumption is only a "programmatic decision",[194] but if we take Dworkin at his word, he cannot prevent others from making different programmatic decisions than he does.

If solipsistic relativism is not acceptable, and if it is the consequence of Dworkin's coherence theory, Dworkin's coherence theory is unacceptable.[195]

Against Nietzsche, Rawls, and Dworkin, I reintroduce teleology. I begin with a "conception of the good," with a conception of persons. The good, the moral, is that which promotes that conception of persons.[196]

I agree with Nietzsche that all of the matters we regard as moral promote life.[197] The moral is that which promotes human existence. But the sheer promotion of human existence cannot be moral, unless I wish to return to Nietzsche. "Human existence" must be limited, qualified.

What is to be promoted is "full human existence". Human existence may be interpreted to take place through some number of

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[194] Dworkin at 177.

[195] Since Dworkin is not (he says) a relativist, his "deep theory" must not be a coherence theory.

[196] I shall restrict myself to human good, human morality; I do not exclude the possibility that other species may have their morality too.

[197] "the force that through the green fuse drives the flower": Dylan Thomas.

modes of existence. We live, and concern ourselves with the means for life--food, clothing, and shelter; we procreate, we work;[198] we learn, know and reason, we play and create and contemplate art; we have friends and acquaintances, we worship; we live morally.[199] Human existence is full where all of these modes of existence are practically possible. I do not dictate any particular selection or emphasis or allocation of resources to any mode of existence; what is to be promoted is that state of affairs in which the full array of human possibilities are available to persons. If these modes of existence are considered abstractly, none, in itself, conflicts with or is superior to any of the others. No hierarchical ordering of modes of existence is required.[200]

The modes of human existence, which fall under factual or metaphysical description, I interpret to fall also under moral description: the modes of human existence, and the full array of modes of human existence are the good, the goals to be promoted by actions we describe as moral. That is, our natural moral responses may be interpreted to have a theme, a purpose, the promotion of human existence. This theme can be perceived when instances of typical moral activity are considered--feeding the hungry, giving drink to the thirsty, clothing the naked, sheltering the homeless, tending the sick--all examples of promoting physical existence. Other sorts of moral activities

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[198] "Work is a good thing for man - a good thing for his humanity - because through work man not only transforms nature, adapting it to his own needs, but he also achieves fulfilment as a human being and indeed, in a sense, becomes 'more a human being'": Pope John Paul II, Encyclical Letter Laborem Exercens (C. C. B., 1981) 33.

[199] Finnis at 86-90; C. B. MacPherson, "The Maximization of Democracy" in Democratic Theory: Essays in Retrieval (Toronto: Oxford University Press, 1979) 1 at 4.

[200] Finnis at 92, 93; MacPherson, "Problems of a Non-Market Theory of Democracy" in Democratic Theory: Essays in Retrieval 39 at 53.

can be readily perceived to promote human existence--actions preserving and promoting the family; providing employment and working; providing and holding property; engaging in political activities; and actions which preserve and promote intellectual life, such as providing access to education, books, tools, and printing facilities.[201] Yet other sorts of human activities--like play, for example--while instantiating a form of human existence, may seem to lack moral quality. If we consider circumstances where such modes of existence are banned or blocked, we can see that the actions of banning or blocking the mode of existence would be immoral. A society in which all play were prevented would not only be a cheerless society, but an immoral society. This points to the moral worth of the mode of existence.[202]

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[201] "The order of the precepts of the natural law is the order of our natural inclinations. For there is in man a primary and natural inclination to good, which he has in common with all things, inasmuch as everything desires the preservation of its own being according to its nature. Through this the natural law pertains to everything that makes for the preservation of human life and all that impedes its death. There is in man a second inclination to more specific ends according to the nature he has in common with other animals. According to this inclination, those things are said to be of natural law "that nature has taught all animals," instincts such as the union of husband and wife, the education of children, and so forth. Third, there is in man a certain inclination to good according to his rational nature, and this is proper to man alone: thus man has a natural inclination to know the truth about God and to live in society. And in respect to this, there come under natural law all actions pertaining to such inclinations: notable that a man should avoid ignorance, that he must not offend those with whom he deals, and all other actions of this kind": St. Thomas Aquinas, ST I-II, Q. 94, a. 2; in Mary T. Clark, ed. An Aquinas Reader (Garden City, New York: Image Books, 1972) 357; in Anton C. Pegis, ed. Introduction to St. Thomas Aquinas (New York: The Modern Library, 1948) at 637-638.

[202] My approach to the good provides an explanation for Rawls' assumption concerning persons' desire for "primary goods". These are "things" (broadly speaking) through and with which we can live our plans of life. They include rights and liberties, opportunities and powers, income and wealth. And self-esteem, Rawls would add: Rawls at 396, 433, 92, 93. Rawls says that our desire for the primary goods is self-evident: "their claims seem

When reflecting on the connection between morality and modes of human existence, I must recall that morality cannot be derived from or produced by the factual or the metaphysical. The "ought" does not issue from the "is". This means that all I can hope to accomplish is a correlation between morality and human existence. A correlation does not entail any necessary link between the items correlated. My correlation, then, will never be indubitable. Skepticism and Nietzsche will remind me of that. Nevertheless, I view this not so much as a weakness, but as the limit of what I can accomplish. I can show my interpretation of the connection, but that interpretation of morality must remain, ultimately, without an indubitable foundation.

Finnis denies that the good is that which is in accordance with human nature. Finnis finds attempts to make a connection between what ought to be and the way we are to be an illegitimate intrusion of metaphysical speculation into moral analysis.[203] The good is not ascertained by the promotion of human existence: "The criterion of conformity with or contrariety to human nature is reasonableness"; "the way to discover what is morally

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evident enough": Rawls at 434. Rawls never explains why these goods are "good". The explanation cannot be that these are good because they fit into some rational plans of life, since we are to prefer more rather than less of these primary goods regardless of particular plans of life: Rawls at 92, 93. I can concede that the primary goods are practically necessary to conduct any rational plan of life. But why should the practical requirement of these goods be a moral indicator? The primary goods are good because they relate to the promotion of human existence, which I have interpreted to be the good.

My approach to the good also accommodates Finnis' observations on the basic human values--life, knowledge, play, aesthetic experience, friendship/sociability, practical reasonableness, and religion. These are not independently good. The goodness of the basic values is drawn from their being aspects of human existence. All are ways of being human.

Moore's error was to select only a small cluster of the goods, and identify them with the whole of human good.

[203] Finnis at 36.

right...and wrong...is to ask, not what is in accordance with human nature, but what is reasonable."[204] My difficulty with Finnis' approach is that it stops at the intellectual, and does not do justice to the world. For if some human activity is judged to be good, the question remains, why is that activity good? Finnis' response is that that is the sort of activity we reasonably judge to be good; but that does not answer the question. That only repeats the subject of the question.

Some metaphysics is inevitable. The facts do not per se determine the application of morality; but unless the facts were those facts, morality would not apply. That is, morality does not, per se, determine its own application.

Another protest may be voiced:"... man as the existentialist sees him is not definable... because to begin with he is nothing... there is no human nature.... Man simply is.... Man is nothing else but that which he makes of himself," says Sartre.[205] But Sartre must concede that his free person has a body, has an intellectual life, has or had some social life. These aspects of existence are lived by every person. The person and the circumstances with which I am concerned have persisted and will persist so long as humans exist. To that extent, Sartre is wrong.[206]

If the good, the moral, is the promotion of personhood, which persons am I talking about? Is the good a measure I can apply only to my life, or does the good apply to all persons? I have not established whether those entities with which I

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[204] Finnis at 35, 36.

[205] J. P. Sartre, "Existentialism is a Humanism" in W. Kaufmann, ed. Existentialism From Dostoevsky to Sartre (Scarborough, Ontario: New American Library, 1975) 345 at 349.

[206] Finnis makes the same reply to the man-as-an-historical-being pitch: "the onus is on him to show us these beings and those differences": Finnis at 50. I suppose that Nietzsche does so, by displaying the overman.

communicate or jostle, those things I call other persons, have the same good as me.

To begin with, I do exist with those entities. Aristotle called man a social or political animal. Aquinas writes

> since man is naturally a social animal, as needing for his life many things that he cannot prepare for himself by himself, consequently he is naturally a part of some multitude [group], from which he receives help in living well.[207]

We enter the world in the company of other persons; we learn to be persons with other persons. If we are saints or madmen, we might seek solitude, but even then, we take with us our history of life with others.

Not only do we live with persons, we also live for persons. I do not mean by this that we think about others, act considerately, love them. Rather, we are persons for other persons.

If skepticism concerning other minds prevailed, I could not identify other as persons. But when I perceive another person, I do not perceive just some noisy mobile physical object - I perceive a person, a creature like myself. I do not perceive some surface phenomena which I analyze, by analogy or otherwise, as indicating the existence of a person:

> My attitude towards him is an attitude towards a soul. I am not of the opinion that he has a soul.[208]

On occasion I may be mistaken - it was not a person but an alien, or a wax effigy. Normally, though, an adult perceives other persons as persons (unless the adult is a sociopath). In the presence of a person, a whole panoply of responses to persons is elicited: compare the experience of the entry into an elevator in which you are the sole other occupant of a stick, a fly, a

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[207] St. Thomas Aquinas, Commentary on Nichomachean Ethics I, 1 in Clark 322-323.

[208] PI at 178.

friendly dog, a person, an angel:

> ... - It comes to this: only of a living human being and what resembles (behaves like) a living human being can one say: it has sensations; it sees; is blind; hears; is deaf; is conscious or unconscious.[209]
>
> Our attitude to what is alive and to what is dead, is not the same. All our reactions are different.[210]

One response to other persons is the moral response. I have argued that the good is that which promotes the existence of persons.[211] The good is not restricted or specially attributable to my good or the sum of some individuals' goods. If skepticism concerning other minds prevailed, I could only identify my own good. Since we experience others as persons, the good is the promotion of others' existences as well as my own:

> ... man feels his dignity at the same time in himself and in others, and thus carries in his heart the principle of a morality superior to himself. This principle does not come to him from outside; it is secreted within him, it is immanent. It constitutes his essence, the essence of society itself. It is the true form of the human spirit, a form which takes shape and grow toward perfection only by the relationship that every day gives birth to social life.[212]

I take this to be the philosophical justification of the proposition "all men are created equal." The good is the

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[209] PI section 281.

[210] PI section 284.

[211] I mean "persons" without distinction--from Mother Teresa to Clifford Olson. This does not entail that every person will be treated in exactly the same manner as every other person. A person's improper actions may be met with a response which harms, in fact, that person. Nevertheless, our orientation to even the most vile soul is that he or she is a soul, and our morally proper responses to that person must always be tempered accordingly.

[212] Proudhon, in George Woodcock, Anarchism (Penguin Books, 1963) 19-20.

promotion of persons; we confront other persons; the good is the promotion of other persons, as much as it is the promotion of our own existence.

If each person's good is as much to be promoted as any other person's good, a good action is an action that promotes some aspect of the good of every person. A good action cannot be contrary to the good of any person.[213] A good act can harm no one. Finnis writes that we must respect every basic value in every act.[214] The good, then, far from leading the inquirer into privacy, leads out into the public realm. The good is not mine alone; the good is the good of each. The promotion of the good of each, demanded by good action, is Finnis' conception of the common good. We are not to perceive the common good as the good of some entity other than natural persons; we are not to think of the common good as the good of some aggregate. The common good

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[213] This does not mean that we must always turn the other cheek--although this remains a moral option (a counsel of perfection) in cases where our lives, and not the lives of others, are to be sacrificed. In part 5.2 (c) *infra*, I outline the characteristics of a moral response to immoral behaviour. These characteristics are applied in the context of State immorality. The characteristics are generalizable. In fact, I drew them from reflections on self-defence. The primary idea is that the promotion of the existence of persons is as much the promotion of my existence as of anyone else's. To protect my existence, I am entitled to take those actions (having the features discussed in part 5.2 (c) *infra*) which block actions harming my existence. The aggressive other may be killed. To that extent, his good is not promoted. Nevertheless, when my action is considered, it (should) promote only the good of persons. It is not aimed at killing the other; it is aimed at blocking him. Death is a tragic consequence, not a goal. To give another application of this line of thought: capital punishment is not morally justifiable, where the harm posed by another can be otherwise contained; imprisonment is justifiable, since it blocks immorality (i.e. preserves public safety). If imprisonment is accompanied by rehabilitation, the promotion of human existence is more strongly manifest. The use of penalties to deter law-breaking is not immoral, so long as the penalty serves to promote the social existence of persons.

[214] Finnis at 118, 120.

is the good of every person.[215]

To say that the good or the moral is that which promotes the existence of persons is to say much and little--much insofar as the good is identified; little, insofar as the good or the moral is not particularly identified.

The identification of the moral is important to my project for two reasons. First, contrary to Arendt and Rawls, civil disobedience is justified, in part, as a moral response against immorality. Second, I wish to evaluate the morality of civil disobedience, and I cannot do so, unless I can determine those things that are moral.

The determination of the moral has two aspects, subjective and objective.

3.2-the subjective aspect of the determination of the moral

We determine the good through "the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, [and] is nothing else than the imprint on us of the divine light."[216]

Since we cannot read off the moral from the factual, we must rely on our "moral intuition" to tell us which features of human existence are moral. I offer some guidelines for the proper use of moral intuition.

As I observed above, a fundamental mode of human existence is that we follow rules. Morality may be considered to be rule-following. To use moral rules properly, we must recall the general means of ensuring that we apply rules properly.

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[215] Finnis at 174, 214.

[216] ST, I-II, Q. 91, a. 2; in Pegis at 618; in Clark at 361: "But the Creator of the world has imprinted in man's heart an order which his conscience reveals to him and enjoins him to obey....": Pope John XXIII, Pacem in Terris, para. 5; in J. Gremillion, ed. The Gospel of Peace and Justice (Maryknoll, New York: Orbis Books, 1976) 201 at 202.

First, one's moral intuitions should be compared with the authorities. The idea of following a rule implies that the rule-applier may apply a rule correctly or incorrectly. A rule-applier may be able to figure out when he or she is applying a rule incorrectly. When the use of a rule is being learned, the rule-applier will follow authorities. After some rules are learned, their application does not cease to be a matter of authority; the application remains right or wrong, but the rule applier can or should be able to work that out himself or herself (I am thinking of the rules of arithmetic). Other rules may only be applied with great difficulty (e.g. the rules of fine art or poetry) and reference to external authorities may be necessary to ensure that the rule-applier applies the rules properly. The authorities consulted would be experienced and mature rule-appliers, persons who are practically reasonable.[217] If one's views are confirmed by morally superior people, one may have some comfort with one's position. If one's views oppose those of admirable persons, one should check one's position. Corroboration by the views of great persons does not guarantee accuracy--both they and one may be wrong. But corroboration does assist. I recognize that arguments from authority frequently are unbecoming. We recognize standards, and superior judgment in other matters (not just anyone can judge a diving competition, a musical competition, or a boxing match); why should we not recognise moral authorities? I caution that corroboration by authorities should be corroboration and not the creation of a moral position. Whilst corroboration of one's genuine views by authorities is helpful, one must avoid adopting or believing that one has a view simply because that is the view held by the authorities. The difference is between a genuine personal experience, and a fabricated

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[217] Finnis at 31, 15 n. 37.

experience.[218]

Second, when one is seeking to determine whether one is applying rules properly, one must ensure that one is considering the rules and the relevant facts alone. Irrelevancy must be shunted aside.

Frequently, the main irrelevancy is self-interest. Whether the subject is physics, law, literature, or morality, the answer to the question, How do I go on? may be skewed by a personal stake in the answer. Another irrelevancy may be our emotional response. Because the moral is ultimately founded on action, not talk, and emotional responses are primarily actions, rather that linguistic responses, the emotional response may not be an improper response; it may be the true and basic response.[219] If we truly feel intolerance, indignation and disgust, we may be reacting humanly to immorality.[220] Nevertheless, we may fool ourselves. The emotional response we do have may not be the moral response we should have. The irrelevant response is the erroneous response, not the true emotional response.

Since the facts are to be considered, one must ensure that one has the right facts, and that one has not mistaken the facts. Judgments of the facts must meet the standards of reasonable evidence and proper inference.[221]

Moral thinkers have provided various techniques to be used by rule-followers to put themselves in a frame of mind in which

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[218] Dworkin warns against parroting the views of others: Dworkin at 250.

[219] This is the defence of Lord Devlin against critics like Dworkin: see Dworkin at 250.

[220] Lord Patrick Devlin, "Morals and the Criminal Law", in The Enforcement of Morals (New York: Oxford University Press, 1965) 1 at 17.

[221] Dworkin at 250; see H. L. A. Hart, "Immorality and Treason" in R. Abelson and M. L. Friquenon, edd. Ethics in Modern Life (New York: St. Martins's Press, 1975) 448 at 452.

proper rule following can be discerned. We have the golden rule, "Do unto others as you would have done unto yourself", in Rabbi Hillel's version, "Do not do unto others as you would not have done unto yourself." We have the ideal observer of utilitarianism, who, above the dust of the arena, can see the right clearly. We have Finnis telling us to consider our lives as we would if we were about to die;[222] others say we should consider our lives as if we had died and had been sent back with one more chance to get it right.[223] We have the "veil of ignorance" Rawls imposes on persons in the original position. All of these techniques cause us to take a point of view detached from our own particular circumstances, whether by adopting the point of view of others, an impartial observer, or oneself with amnesia. The good is that which promotes persons, not that which promotes your or my particular interests exclusively. These techniques lead us to consider ourselves and others as persons.

Third, the consequences of a proposed application of rules should be considered. The application should be consistent with other applications and with any basic principles held by the rule-applier. If the application tends to disrupt or render uncertain other applications of the rule, the proposed application may be wrong. The moral rule-follower must pay heed to the consequences of his applications. If an application of a moral rule results in grave unhappiness for many, or social paralysis, the application may not be proper.[224]

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[222] Finnis at 104

[223] I think the source is Zig Zigglar.

[224] Finnis objects vigorously to the overreliance on considering consequences in morality. Utilitarianism is the object of his wrath. He says that the "methodological injunction to maximize good(s) is irrational...senseless": at 113. Finnis is unfair to utilitarianism in particular, and to methodological maximizers of the good in general. That utilitarianism is a moral force to be reckoned with is implicit in Rawls, as in modern Anglo-American philosophy as a whole. Utilitarian considerations tug at us in our daily moral decision making. This is particularly so

Fourth, to apply rules with some hope of accuracy, some personal cultivation may be necessary. To apply the rules of a foreign language properly, one cannot simply go to a dictionary or a grammar and memorize a few rules. The language as a whole, and, perhaps some culture too, must be absorbed before the rules of a language may be properly used. In the moral context, cultivation is coupled with having a rational plan of life. Finnis puts this claim strongly: "the basic aspects of human well-being are discernable only to one who thinks about his opportunities" to one who "intelligently directs, focuses, and controls his urges, inclinations and impulses" in the service of a rational plan of life.[225] If "rational plan of life" means some grand plan of life, with goals and interim targets, dates and resource allocations, probably most of us do not have a rational plan of life--at least I do not. I trust that "rational plan of life" means a life devoted, to some significant degree, to intelligent activity--arts, letters, sciences--and not, predominantly, to fleeting janglings of the nerves--professional

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where decisions are made that concern large numbers of persons. Nagel attests to the relevance of utilitarian considerations: "Equality" at 125. Finnis has two difficulties, in addition to his lack of appreciation for utilitarianism. First, Finnis claims that the presupposition of utilitarianism, that the utilities of all human projects can be reduced to a common denominator, is "irrational". This is not true. Utilitarianism relies on an interpretation of morality, wherein all human good can be reduced to a common denominator, psychic satisfactions: see R. M. Haig, quoted in W. Grover and F. Iacobucci, edd. Materials on Canadian Income Tax 5th ed. (Don Mills, Ontario: Richard De Boo Publishers, 1983) 141. This may be a bad interpretation; it may frequently be expressed improperly (through the commission of the naturalistic fallacy described by Moore) but it is still an interpretation, and one that must be given serious consideration. Second, Finnis' position presupposes that his basic values cannot be subsumed under one dominant end (which I have denied, arguing that the dominant end is the promotion of human existence), and that the basic values cannot be ranked, priorized, or ordered (which I also deny, although not here).

[225] Finnis at 103.

sports, intoxicants. Intelligent activities tend to broaden horizons, to teach one alternative perspectives, to promote detachment from selfish desires. Intelligent activities also aid in developing our poor minds. The better our minds work, the better we ought to be able to apply moral rules.

The risk of error in the application of rules is on the rule-applier. The rule-applier must, ultimately, decide to apply a rule, given the authorities, his attempted focusing on the rule and its consequences, and his or her experience. We are forced to choose. In the moral context, this is to say that we have a conscience.

3.3-the objective aspect of the determination of the moral

The moral is based on our ungrounded way of acting, the moral response to others. But we seldom live our lives at the limit of language, with only our naked moral responses to guide us. Intertwined with our action is our talk, which interprets, particularizes, and may modify at least some of our actions. I have tried to show that this moral response discloses a pattern: the moral promotes human existence. The application of this moral objective, unfortunately, is not always plain.

We need moral guidance.

Wittgenstein identifies the problem, using the example of cubes:

> Well, suppose that a picture does come before your mind when you hear the word "cube", say the drawing of a cube. In what sense can this picture fit or fail to fit a use of the word "cube"? - Perhaps you say: "It's quite simple; -if that picture occurs to me and I point to a triangular prism for instance, and say it is a cube, then this use of the word doesn't fit the picture." - But doesn't it fit? I have purposely so chosen the example that it is quite easy to imagine a method of projection according to which the picture

does fit after all.[226]

> Suppose, however, that not merely the picture of the cube, but also the method of projection comes before our mind? - How am I to imagine this? - Perhaps I see before me a scheme shewing the method of projection: say a picture of two cubes connected by lines of projection....[227]

With geometrical concepts, at least, the "method of projection" from definition through application to object does not appear troublesome. Wittgenstein tries to show that the method of projection is not so obvious, despite appearances: "But does this really get me any further? Can't I now imagine different applications of this scheme too?"[228]

Whence comes the method of projection, by which we can apply our moral language? Wittgenstein gives us a Delphic answer:

> If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments. This seems to abolish logic, but it does not do so.--It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call "measuring" is partly determined by a certain constancy in results of measurement.[229]

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[226] PI section 139.

[227] PI section 141.

[228] ibid.

[229] PI section 242. I detect a similar idea in Dicey's account of the third aspect of the rule of law: "We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution...are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security...given to the rights of individuals results, or appears to result, from the general principles of the constitution": "The Rule of Law: Its Nature and General Applications", in A. A. McLellan, T. J. Christian, B. Elman, G. L. Gall, Constitutional Law: Supplementary Materials

This passage may be interpreted in two ways. First, Wittgenstein could be referring to the natural sorts of activities, characteristic of the human form of life, from which the measuring language-game is drawn. Second, Wittgenstein could be referring to a less deep aspect of human existence, not forms of life, but the life of a society.[230] The life of a society will turn around the standards the society uses for interpreting its various rules, the moral rules among others.[231] Different societies may use different standards; different societies may obtain different "constancies" in the results of their moral measurements.

The guidance we receive, the particular interpretations of the rules we learn, come to us from our life with others. Our moral rule following, like other rule following, is not solitary, but founded in our community: "there must be agreement...in judgments...what we call "measuring" is partly determined by a certain constancy in results of measurement" (my emphasis); "'So you are saying that human agreement decides what is true and what is false'--It is what human beings say that is true and false; and they agree in the language they use. That is not agreement

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(1982) 11 at 23-24.

[230] see Peter Winch, "Understanding a Primitive Society" in F. R. Dallmayr and T. A. McCarthy, edd. Understanding and Social Inquiry (Notre Dame: University of Notre Dame Press, 1977) 159 at 176.

[231] "This, however, is so far to say nothing about what in particular constitutes rational behaviour in that society; that would require more particular knowledge about the norms they appeal to in living their lives. In other words, it is not so much a matter of invoking 'our norms of rationality' as of invoking our notion of rationality in speaking of their behaviour in terms of 'conformity to norms'. But how precisely this notion is to be applied to them will depend on our reading of their conformity to norms--what counts for them as conformity and what does not": Winch, "Understanding a Primitive Society" at 177.

in opinions but in form of life."[232] We do not enter the world with definitions in our heads. Even if we did, we would not, by virtue of those definitions alone, be able to apply those definitions to the world. We have the capacity to use language, to live in a world--and that is a marvellous capacity--but that is insufficient. We must be taught how to live, and how to use our language, moral and otherwise. Moreover, since activity grounds our language, we must be with others to do and learn the activities grounding all of our talk that relates to others.[233]

Our moral life, then, rests on agreement in judgments, on shared moral activity. We find the guidance we need in our moral community, in what I call the "moral consensus".

Rawls notes the practically necessary presence of this moral consensus. Agreement in conceptions, he writes, is a prerequisite for a viable human community:[234] "But unless there existed a common perspective, the assumption of which narrowed differences of opinion, reasoning and argument would be pointless and we would have no rational grounds for believing in the soundness of our convictions."[235]

Lord Devlin has a notion of society consistent with my notion of moral consensus. Society, for Lord Devlin, is a community of ideas, a moral structure composed of interpretations of the moral shared by all reasonable members of a society.[236]

The moral consensus has two features of note. First, the consensus expresses authority. The authority concerns the manner in which moral rules are applied to facts. In the consensus, one

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[232] PI section 241; I suggest that "form of life" is not used here in the primitive, basic sense.

[233] see Cavell, The Claim of Reason at 178.

[234] Rawls at 6.

[235] Rawls at 517-518.

[236] Lord Devlin at 9, 10, 15.

learns the standards of moral judgment. The standards are authoritative in that a reference to the standards is an "exclusionary reason" for a judgment or an action: "This is the way we do it."[237] Other reasons are excluded. Resort should not and cannot be had to other reasons. The authority is not coercive. Language and thinking are learned without threats or punishment. The authority is "directive": if you want to be one of us, this is how you will speak. This does not make the authority purely conventional. Purely conventional standards for rule applications would be nothing but orders, whether or not backed up by force. The moral consensus exposes a way in which the moral rules can be used. But the consensus follows the logic or the principle of immanent development set by the rules, as they interact with the world. The particular applications of the rules in the moral consensus are not deducible from the rules alone. To this extent, the authority is conventional, being a mode of interpretation of the rules. I do not concede that all interpretations may be equally correct. Some may be reasonably acceptable; some may be wrong.

Second, the moral consensus will have some tolerance or elasticity. Not everyone in the consensus need agree in judgments in all circumstances at all time. Rawls makes this point by describing the consensus as overlapping rather than strict.[238] Lord Devlin expressly uses the notion of tolerance as forming the boundary of moral consensus; the boundary of tolerance is set by our feelings of intolerance, indignation and disgust.[239]

I have interpreted the moral as that which promotes the existence of persons, and I have indicated the subjective and objective means by which the general demand of morality is

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[237] Finnis at 234.

[238] Rawls at 388.

[239] Lord Devlin at 17.

particularized for us, through moral reflection free of irrelevancy and the moral consensus. This stage in my journey to my account of civil disobedience is still abstract: in the following Chapter, I bring my account of morality into the actual lives of persons--into their cooperation and conflict--and determine the morality of the State, of the law, and of obeying the law.

CHAPTER 4: THE STATE

Civil disobedience is action contrary to laws, the rules of a State; the law-breaking is done pursuant to standards justifying the breaking of laws. The disobedient claim that their rights are violated and they seek to promote their rights. The law-breaking is aimed at other citizens, who are to be wooed to retract their consent to the law or the State behaviour in question. If citizens have no moral obligation to obey laws, then the breaking of laws would not be relevant to an inquiry into the morality of civil disobedience. If citizens do have a moral obligation to obey laws, the scope of that obligation will be central to the determination of the morality of civil disobedience. In this Chapter, I consider the morality of the State and the law, and fix the morality of the State in the operations of the State in resolving conflict and protecting rights. I consider the circumstances in which citizens have an obligation to obey the law, and I consider the consent of citizens to the State.

4.1-the origin of rights

Humans co-exist through two basic modes of interrelationship--cooperation and conflict.

(a) cooperation

Cooperation is based on our radical incompleteness, our dependence on others. We are made whole, and granted survival, by cooperation. Cooperation is of two types, physical and intellectual.[240]

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[240] Finnis describes four, rather than two orders--the physical and biological, the intellectual, the imposed orders of language, technology and technique, and common action: at 125. I combine his first and last orders as physical cooperation, and his second

Physical cooperation is manifest. We are carried in our mothers' wombs. We are fed, clothed and sheltered. We are taught words and skills. We work together. We marry and beget children.[241] Did members of our species not cooperate in the business of life, our species could not have survived. If we do not cooperate (e.g. in environmental matters) the survival of our species is threatened.

Intellectual cooperation is as important to our survival as humans as is physical cooperation. We cooperate in the use of language, the medium of thought. We feed our children not only with food, but with language, concepts, thought. Cooperation is required for more than passing on the tongue. By our cooperation, we express and sustain ways of using language and ways of thinking; absent such ways, language and thought would be, if not impossible, more useless than we require for survival.

Members of cooperative groups evidence emotional attachments to their cooperative groups. Our emotional attachments to our physical cooperative groups--the family, the neighbourhood, the trade union, are evident. Less evident are our emotional attachments to our intellectual cooperative groups. But any one who has spent time in a foreign land may attest to the pleasure of hearing and reading one's native tongue.

The emotional bonds are correlated with the moral worth of cooperation. Because cooperation promotes human existence, it is good. As I said above, because the moral is ultimately founded on action, and emotional responses are action, our emotional response may (if authentic) be a basic moral response. Rawls refers to these emotional-moral bonds. He describes the

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and third orders as intellectual cooperation.

[241] Kropotkin argues that this "mutual aid", and not the competitiveness of natural selection, is the primary form of all animals' life with their kin.

"morality of authority", the emotional-moral bond of a child,[242] and the "morality of association", appropriate to our place in cooperative schemes.[243] Finnis describes friendship as the paradigm of cooperative association.[244]

(b) conflict

Conflict, at least in its benign form, is also a fundamental form of life with others. While cooperation is founded on our dependence, conflict is founded on our independence. While we are completed by others, and only exist as beings with others, we nevertheless remain ourselves. Cooperative groups do not become a new creature composed of its members. Though I may need you, I still am me.

Conflict takes three forms, benign conflict, conflict from scarcity, and conflict from perversity.

Benign conflict is part of the human condition. Even though the general outlines of good activities are tolerably clear, and moral judgments in some or many fact situations are clear, in many cases, particularly where the good relating to two or more persons appears to conflict, discerning the proper course of action may be difficult. Rawls identifies three human problems--coordination, efficiency and stability.[245] Different group members may have different solutions to these problems. Hence, society is marked by conflict as well as identity of interests.[246] For example, someone may admit to causing an injury, and admit

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[242] Rawls intends, apparently, to denigrate authority in moral matters. I suggest that we may all be bigger children in moral matters than we like to admit.

[243] Rawls as 467, 468.

[244] Finnis at 141, 143.

[245] Rawls at 6.

[246] Rawls at 4, 126, 84.

that if an alleged rule existed, he would have to compensate the victim, but he could deny that such a rule exists and binds him. Someone may admit that a rule binds him (e.g. the rule against murder), but deny that the rule applies to him ("I didn't do it"). Again, someone may wish to employ the resources of a group in some scheme. He or she may have supporters. Others may dispute the propriety of the scheme.[247] Finnis points out that conflict (my benign conflict) may increase with the skill and intelligence of group members.[248] Benign conflict assists humanity. Old ways or current ways are not necessarily the best; dispute may lead to new and better ways of doing things.

Conflict from scarcity arises when a group does not have in its possession or power resources sufficient to satisfy its members. Rawls thinks that "moderate scarcity" is a condition of human existence.[249] If group members have insufficient resources, or consider themselves to have insufficient resources, they will conflict over allocations of those resources. This form of conflict depends on our self-interest.

Conflict from perversity arises from the pale criminal within. Rawls does not discuss this form of conflict. This is conflict not caused by a desire to improve the lot of persons, or even by a desire to grab a bigger share of the resources of the

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[247] Benign conflict does not depend on scarcity. It would occur even if a group had adequate resources to accommodate every member of the group. Some members of the group would propose some redistribution or some project which would result in the unhappiness of others.

[248] Finnis at 231, 245.

[249] This may be a cultural prejudice; scarcity may not be an ontological condition: "Material scarcity is scarcity relative to some standard of material wants, and the standard assumed in the view that scarcity is a permanent natural phenomenon is not the same as the standard appropriate to democratic theory": C. B. MacPherson, "Problems of a Non-Market Theory of Democracy" in Democratic Theory: Essays in Retrieval 39 at 61; see Ivan Illich, "Readings to 'Shadow Work' in Shadow Work (Boston: Marion Boyers, 1981) 123.

group for oneself or one's friends, but by the desire to work evil. We ignore how bad people can be at our peril.

4.2-rights

Between conflicting persons, talk of rights has a place. In pure or relatively pure circumstances of cooperation, talk of rights has no place. One does not claim affection from a friend, a spouse, or a child as a right. One does not assert rights to be treated properly by them--at least so long as the family remains a family. If one does so, the family is on its way to court. Cooperation has been displaced by conflict. In circumstances of conflict, one person demands or claims proper treatment from another. Such a demand or a claim is the assertion of a right.

I am not suggesting that all legal rights are expressions of claims or demands. Hohfeld distinguishes between four sorts of relations (as jural correlatives) to which the term "right" is equivocally predicated: rights and duties, privileges and "no-rights", powers and liabilities, immunities and disabilities.[250] To have a right is to be able to claim some action or inaction from another; the other is obligated (under a duty) to perform the action or not to act.[251] To have a privilege is not to be under a duty not to do or abstain from doing something, to have a privilege is to be free from the right or claim of another; the other has no right to claim that the person not do the act or abstain from the act.[252] To have a power is to be able to change or control legal relations; the other is subject to the change

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[250] W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16 at 30.

[251] Hohfeld at 32.

[252] Hohfeld at 32-43, 55.

effected.[253] To have an immunity is to be free from having one's legal relations changed; the other lacks the power to change one's relations.[254]

In addition to Hohfeld's distinctions, we have Hart's distinction between two broad classes of legal rules, primary and secondary rules.[255] Primary rules are rules fixing obligations to do or abstain from doing certain things.[256] Secondary rules are concerned with primary rules, and specify the ways in which the primary rules may be "ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[257]

Hohfeld and Hart teach that not all rights are claims to which are correlated duties.

Nevertheless, for the purposes of my discussion,[258] I will use the term "rights" to embrace rights, duties, powers, immunities and both primary and secondary rules. My justification for this fusion, flying in the face of the distinctions just made, is that talk of rights arises, in its conceptual beginnings, in claims against others--i.e., within situations of conflict, where the actions of the other do not conform to what the claimant perceives to be the proper course of action. Thus, I may claim that you owe a duty to me to perform your contract; I may claim that I have a privilege to assemble with my fellows and not to be interfered with by you; I may claim

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[253] Hohfeld at 44-46, 55.

[254] Hohfeld at 55.

[255] H. L. A. Hart, The Concept of Law ("Concept") (Toronto: Oxford University Press, 1979) at 89.

[256] Hart, Concept at 90, 92.

[257] Hart, Concept at 92.

[258] and not for the purposes of the differentiation of rights appropriate to analytical jurisprudence.

that I have a power to accept your offer, and you are liable to be bound by my acceptance; I may claim that I am immune to your efforts to seize my property; I may claim that a rule need not be followed because it lacks the appropriate pedigree.

The background of a rights claim is morality. The good is that which promotes human existence, yours, mine, all persons'. A good action is an action that promotes some aspect of the good of every person and is not contrary to the good of any person. In this world we have conflict. The world is unable to accommodate the proposed good actions of everyone. How then should we act? Each of us must act, in the performance of the good as we judge it, without preventing other persons from promoting the good as they understand it. To hinder or interfere with another person's ability to promote his or her own existence is not good; it is immoral.

Persons have what I shall call "human rights". These are expressed in claims that others must not interfere with or hinder the claimant's pursuit of the good. These claims are, at root, privileges in Hohfeld's sense. They are freedoms to act. Duties subsist, corresponding to others' rights: persons are obligated not to interfere with others. Persons also, then, have natural duties:

> Once this is admitted, it is also clear that in human society to one man's natural right there correspond a duty in other persons: the duty, namely, of acknowledging and respecting the right in question. For every fundamental human right draws its indestructible moral force from the natural law, which, in granting it, imposes a corresponding obligation.[259]

Human rights can be listed, corresponding to the aspects of human existence and corresponding to the aspects of human good. Corresponding to our natural requirements of existence, we have rights to life, liberty and security of the person or the pursuit

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[259] Pacem in Terris, para. 30, in Gremillion at 207.

of happiness.[260] Corresponding to our social and educational needs we have the freedoms of conscience and religion, thought, belief, opinion and expression, and peaceful assembly.

Human rights are linked to human needs, that is, to our needs to live each of the aspects of full human existence. Hart has said that the unifying element of rights is choice.[261] We see that--at least--another unifying element of human rights is that human rights express the basic human needs or the aspects of human existence. Hart has recognized that to account for human rights, choice must be supplemented with needs:

> ...this theory, centred on the notion of a legally respected individual choice, cannot be taken as exhausting the notion of a legal right: the notion of individual benefit must be brought in...to supplement the notion of individual choice. Unless this is done no adequate account can be given of the deployment of the language of rights, in two contexts, when certain freedoms and benefits are regarded as essential for the maintenance of the life, the security, the development, and the dignity of the individual.[262]

4.3-the goodness of the State

Our awareness of human rights arises from conflict. Conflict is the midwife of rights. Conflict, though, threatens infanticide. It tends to weaken and may ultimately destroy human rights. Benign conflict contains within itself no principle for

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[260] the Charter, para. 2(d), the Declaration of Independence.

[261] H. L. A. Hart, "Definition and Theory in Jurisprudence" (London: Oxford University Press, 1959) at 17 n.2.

[262] H. L. A. Hart, "Bentham on Legal Rights" in D. Lyons, ed. Rights (Belmont, California: Wadsworth Publishing Co., 1979) 125 at 145; see Finnis at 205. Reference to needs does not exclude the element of choice. A human right is a privilege to act on the part of the claimant or potential claimant. It is not an obligation to act. A person may assert his or her human rights, but need not do so.

coordinating and subordinating persons, or for final determinations of conflicts. Conflict over scarce resources contains within itself no principle of allocation.[263] Conflicts caused by perversity rend social relationships. To overcome these conflicts, and to protect human rights, a conflict resolution mechanism is necessary. Persons require the State: "...To secure these rights, Governments were instituted among Men...."[264] To be moral, the conflict resolution mechanism must promote the common good, the good of each person subject to the mechanism. The conflict resolution system must respect the rights of each citizen.

The State earns its morality, and persons subject to the State, its citizens, become obligated to obey the rules of the State, through the formal and substantive workings of the State.

(a) formal workings

The formal workings of the State provide mechanisms for resolving conflicts. For a mechanism to resolve conflicts, a mechanism must have two main features: it must be authoritative, and it must be final. The mechanism must be authoritative, so that citizens are bound to resort to and be bound by the mechanism. If citizens are not bound to resort to a mechanism, it may not be invoked to resolve any conflicts. The mechanism

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[263] "...man is naturally a social animal; men even in the state of innocence would have lived in society. Social life among many could not exist, however, unless someone took the position of authority to direct them to the common good. For many people are by their very multiplicity interested in a multiplicity of ends, while one person is concerned with one end": St. Thomas Aquinas, ST I-II, Q. 90, a. 3, in Pegis at 612; Q. 96, a. 4, in Clark ed. at 367; see Pacem in Terris, sec. 46; "...there is no good except in order...order in the supreme good....": D. J. Donoso-Cortes, "The Fallacies of Liberalism" in R. L. Schuettinger, ed., The Conservative Tradition in European Thought (New York: Capricorn Books, 1971) 284 at 289.

[264] the Declaration of Independence.

must lead to a final determination of the conflict, otherwise the conflict will not, obviously enough, be settled, and use of the mechanism might not be useful.[265]

The State resolves conflict through laws--authoritative, final rules.[266] If laws are not authoritative and final, the citizen will have no obligation to obey the law. The law will not be doing the work it is required to do.

Whether or not laws are final may be determined by a review of laws in their institutional contexts. If persons outside the judicial system may decide an issue before the Courts, despite

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[265] Examples of conflict resolution mechanisms are buy-sell agreements between shareholders, the judicial system, and the Parliamentary system. All three mechanisms are authoritative, buy-sell agreements because the parties agreed to them, and the latter two mechanisms because of what I might call convention. All three mechanisms are final. If the provisions of a buy-sell agreement apply, if the agreement provides for the removal of one faction of dissenting shareholders, that faction of dissenting shareholders must give up its shares; the interpretation of the application of the buy-sell agreement may go to the Courts, but if it is a valid contract, the parties must live with the agreement they struck. The judicial system provides finality. Ultimately, the Supreme Court of Canada may rule. Parliament sorts through diverse opinions through debate, and asserts finality by enacting a law. Of course, a person may sometimes engage the mechanisms again: a new agreement may be reached; a new case may be taken to Court, new legislators may be lobbied. But until the mechanism is again engaged, the resolutions engineered by the conflict resolution mechanism stand.

[266] The resolution of conflict by laws has three elements. The State must provide laws, apply and interpret laws, and enforce laws. These are the legislative, judicial, and executive operations. These may or may not be embodied in separate institutions. By legislative operations, public opinion or the ruler's will is translated into laws. The judicial operation decides facts, applies laws and determines non-statutory (common) laws, determines the meaning of laws, and overturns law, when either the legislating body did not have the authority or capacity to enact the laws, or the laws conflict with some constitutionally entrenched value. The executive operation carries out legal directions, and enforces the provisions of laws.

the rulings of the Courts, the Courts' resolutions are not final. If persons outside of Parliament may make laws, then Parliament's resolutions are not final.

The authority of laws is a more troublesome notion. Laws are authoritative, in that citizens are obligated to follow laws, and, in domestic legal systems, the State will enforce the laws, to encourage compliance with the laws. Whence comes this authority?

Hart teaches that laws have authority if the laws have the appropriate pedigree. The basic formal difference between legal rules and the rules of morality, the rules of sports, or the rules of etiquette is that laws are authorized by the rule of recognition. To have legal authority, rules must satisfy the criteria specified in the "rule of recognition" of the jurisdiction. The rule of recognition is one of Hart's secondary rules. It "specifies some feature or features possession of which by a suggested rule is taken as a conclusive indication that it is a rule of the group...."; it is a rule for the identification of the primary legal rules.[267] The rule of recognition is "ultimate", in that there is no rule providing criteria for the assessment of its own legal validity.[268] Hart asserts that this rule is not "assumed" or "postulated"; it is "simply accepted as appropriate for use."[269] Hart has in mind a

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[267] Hart, Concept at 97, 100.

[268] Hart, Concept at 104.

[269] Hart at 105. Law, then, is conventional. Perhaps an analogy may be drawn to other "conventional" features of human existence, such as language, or morality. Law has that curious conventionality characteristic of language. It could be other than it is. It exists as it does because people make it that way. Yet we are born into it, find ourselves subject to it, unlike ordinary contracts. Law, in some respects, is more conventional than language. We can change the law easily and often. But language too can be changed. The ultimate question of law, as of language and morality, is why does it exist--how can it exist? Why do we have language? This is the way people act. Why do we have morality? This is the way people act. Why do we have law? This

broad notion of acceptance. It is more a non-dissent than an ordinary acceptance. Persons could, however, cease to abide by the rule of recognition. The rule of recognition may "shift".[270]

Dworkin wants to spoil Hart's tidy account. His attack has three main parts. First, he identifies a species of rules he calls "principles", which do not function like legal rules, properly speaking.[271] Second, he argues that principles cannot be accounted for by a rule of recognition: "even though principles draw support from the official acts of legal institutions, they do not have a single or direct enough connection with those acts to frame that connection in terms of criteria specified by some ultimate master rule of recognition."[272] Third, principles form part of the law.[273]

Dworkin's weakness is the third point. Dworkin knows that he has a problem, but he tries to avoid it.[274] Dworkin does not provide a detailed account of the concept of law. His concept of law is

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is the way people act. I recall that neo-Kantians were criticized for providing transcendental deductions of many modes of human existence. Maybe I am providing an excess activist reduction of law. Or perhaps the neo-Kantians were on the right track, and I am too.

[270] Hart, Concept at 117.

[271] Dworkin at 24-25, 26.

[272] Dworkin at 41.

[273] Dworkin at 29, 44.

[274] "There is a further objection...which I shall not try to answer. I have no answer to the argument that the term "law" can be used in such a way as to make the positivist's thesis true by stipulation. It can be used, that is, in such a way that the speaker recognizes as 'legal' standards only those standards judges and lawyers cite which are in fact identified by some commonly-recognized test": Dworkin at 47. Dworkin is making a preemptive strike against opponents who might challenge his concept of law. These opponents, like Humpty Dumpty, only try to change definitions, and do not deal with the substance of law.

> the concept of law now in general employment, which is, I take it, the concept of the standards that provide for the rights and duties that a government has a duty to recognize and enforce, at least in principle, through the familiar institutions of courts and police.[275]

The problem is this: are Dworkin's principles describable as law under the concept of law in general employment?

I submit that principles are not law, properly speaking.

Certainly Courts consider principles (e.g. the maxims of equity) when making decisions. Courts also frequently consult dictionaries. Judges use logic and techniques of practical reasoning. Courts, on occasion, quote from philosophers and men of letters. Sometimes economic doctrines are referred to. Shakespeare is sometimes quoted. Not all of the foregoing can be said to be "law", just because they figure in judicial reasoning.

Dworkin fails to make a key distinction between the law, and interpretations of the law or predictions of what Courts will decide. Lawyers and judges may interpret the law, discuss the scope of application of particular decisions, consider the meaning of legislation. But until a Court or a legislature formally issues its determination, the law is not made. Only when certain formal procedures are satisfied does all of the talk enter the body of the law.[276]

Dworkin points to "customary laws" as being outside the

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[275] ibid.

[276] Dworkin might want to say that if a person's interpretation of the law is sustained by a Court, then that person had the rights he thought he had before the Court made its decision. Such a position would be a form of legal fatalism, akin to the reasoning (rejected by Aristotle) that "if it is white now it was true to say earlier that it would be white; so that it was always true to say of anything that has happened that it would be so": Aristotle, De Interpretatione (Toronto: Oxford University Press, 1978) 43 at 50 (18b9). The decision of a Court may have a retroactive effect; but that does not mean that before a decision is made, a person may behave as if he had the challenged right.

scope of the decisions of the Courts and legislatures.[277] This gets Dworkin nowhere. Customary laws (e.g. the law merchant) only have the force of law in our mature legal system insofar as the customary law has been judicially recognized--in decisions--or has been enforced by statute.

Dworkin's principles form part of the background of the law, and may be useful tools for understanding the law, but principles are not law.

Because principles do not form part of the law, the (purported) failure of the rule of recognition to account for principles does not imply that the rule of recognition does not establish the legal authority of laws. Dworkin does not prove that Hart is wrong, or that we should abandon Hart's account of the rule of recognition.

Authority, established by the rule of recognition in force in a particular State, and finality are necessary conditions of the morality and the morally obligatory character of laws. Finality and authority may constitute the kernel of morality of even tyrannical regimes:

> A tyrannical law, through not being according to law, is not a law, absolutely speaking, but rather a perversion of law; and yet insofar as it is something in the nature of a law, it aims at the citizens being good.[278]

That kernel of morality, though, may be the only morality of laws. If laws have the appropriate pedigree, if laws satisfy the rule of recognition, they will be laws. I accept the legal positivists' position: "The existence of law is one thing, its merit or demerit another"; "The law of a State is not an ideal

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[277] Dworkin at 42.

[278] St. Thomas Aquinas, ST I-II, Q. 92, a. 1; in Treatise on Law, trans. M. R. MacGuigan, in J. M. Law, ed., Jurisprudence: Case Book (University of Alberta, Faculty of Law, 1985) 354 at 363. This may have been the (perhaps sole) virtue of the Soviet Union; the order it imposed held in check the ethnic discord (and plain perversity) now emerging in the various republics.

but something which actually exists...it is not that which ought to be, but that which is"; "Legal norms may have any kind of content".[279] An immoral law may not be a law "absolutely speaking", but for the purposes of the State which created the law it will be a law:

> The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by a sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God...the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.[280]

Though laws be laws, laws are not necessarily moral. Again, I agree with the legal positivists.

The morality of the laws of the State is not formally secured only by authority and finality. For laws to secure morality formally, laws must respect the rights of each citizen. This requirement of morality translates into the requirement that the State and its laws be "just". Since laws are to promote the existence of each person, this requirement is that persons be treated as "equal before the law";[281] "individuals are entitled in respect of each other to a certain relative position of equality

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[279] Hart, Concept, quoting Austin, Gray, and Kelsen, at 203.

[280] G. Radbruch, quoted in H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Rev. 593 in J. M. Law, ed. 256 at 269.

[281] the Charter, subsection 15(1); article 7 of the Universal Declaration of Human Rights.

or inequality."[282] The law must treat like cases alike and unlike cases differently. Another way to put this requirement is that the law must be fair, and should not rely on arbitrary distinctions.[283] Thus, the law should treat as irrelevant to the application of the law persons' race, nationality, colour, country of origin, religion, sex, age, and mental and physical disabilities;[284] position or social status are also irrelevant--none are above the law.[285]

To ensure that the rights of each citizen are respected and that each citizen is treated equally,

(i) laws should have the following features: Laws should be drafted in general terms, and should apply universally.[286] Legislation respecting detailed particular circumstances should be avoided.[287] The more particular the law becomes, the stronger the inference that the law is being abandoned, and wide, arbitrary, discretionary power is being grasped.[288] Laws should be promulgated, made public.[289] Laws should be comprehensible, clear and coherent.[290] (I note that the Income Tax Act (Canada) violates each of these desiderata.)

(ii) laws must be applied and enforced by procedures having the following features: When persons come before the Courts,

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[282] Hart, Concept at 155; see W. Frankena, Ethics (Englewood Cliffs, N. J.: Prentice-Hall Inc., 1963) 39.

[283] Rawls at 111, 136.

[284] the Charter, subsection 15(1).

[285] Dicey at 21.

[286] Rawls at 131, 132.

[287] Finnis at 270.

[288] Dicey at 16.

[289] Finnis at 270, Rawls at 236.

[290] Finnis at 270.

which are to judge the applications of legal rules to particular facts, each person must have adequate notice of the case he or she is to meet; each person must be able to make full answer and defence to complaints; and each person must have his or her case heard before an unbiased Court.[291] Persons ought also to be able to rely on precedent, since like cases should be treated alike. Court procedures, like laws, should be simple, certain, and not the preserve of the rich.

(iii) laws must be created by a procedure having the following features: Each person must have an equal opportunity to influence the creation of laws. Each person must have an equal opportunity to be a law-maker.[292]

If the conflict resolution system of a State meets the foregoing requirements, including finality and authority, it will be just. These requirements are the necessary and sufficient conditions of justice.[293] To that extent, the State will promote the existence of its citizens, and respect the rights of each citizen. The conflict resolution system will serve the common good.

(b) substantive workings

The morality of the State is not constituted only by its formal workings. Were it, we would have to be morally content with the constitution of Kant's devils. The substantive laws enacted by a State may be moral or immoral. Since the State is to promote the common good, which is moral, the substantive laws of

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[291] the Charter, section 11.

[292] see article 21 of the Universal Declaration of Human Rights.

[293] I have interpreted justice (contrary to Finnis) to concern the formal workings of a State: a just State may yet be an immoral State. The State may err in its substantive workings.

a State should be moral.[294]

Human rights carve out the broad areas of human moral activity. Within these broad areas, the State sets to work, defining through laws the more precise rules through which social life is made workable:

> ...just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences....so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determinations of certain matters. These particular determinations, devised by human reason, are called human laws....[295]

The relationship between some laws and morality is not manifest. Laws may have four different relationships to morality: laws may follow morality, e.g. some parts of our substantive criminal law;[296] laws may be more moral than moral,

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[294] Consider how life would be if the laws of a State bore no requirement of morality. Consider Kafka's novel, The Trial, trans. W. and E. Muir (Harmondsworth: Penguin Books Ltd., 1965). "Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning": The Trial at 7. Joseph K.'s arrest neither had, nor within the State, needed a reason. It occurred. Joseph K. had no involvement with the court processes. They occurred. He was sentenced and executed. This happened. He received no real response to his "Why?" and "Wherefore?". The law simply was, and Joseph K. was simply caught in it: "The only sensible thing was to adapt oneself to existing conditions": The Trial at 134. To stop at the law, the rules, to stop without a further moral explanation, is to live in a world that only happens to be. Such a world would be, in principle, no different from Joseph K.'s world. This can be our world, but it need not be. We can morally judge the law.

[295] St. Thomas Aquinas, ST I-II Q. 91, a. 3; in MacGuigan at 360; in Pegis at 620.

[296] Finnis notes that "...the integration of even an uncontroversial requirement of practical reasonableness into the law will not be a simple matter. The terms of the requirement...will have to be specified in language coherent with the language of other parts of the law. And then the part which

and impose higher standards than may our morality, e.g. some laws of fiduciary duty (concerning, e.g. trustees, lawyers, company directors); laws may be morally neutral, e.g. technical provisions of the Income Tax Act or technical provisions of land law; laws may be immoral, e.g. some judge-made law concerning wrongfully-dismissed non-unionized workers, or provisions of the Income Tax Act preventing deductions for all but restricted medical expenses. The existence of patently immoral laws does not rebut my contention that laws should be moral, any more that the existence of murders proves that cold-blooded killing is not wrong.[297]

Not only must the law express morality in what it provides, it must express morality in that which it does not provide. A moral State must also exercise legislative and executive restraint. One might put this in Trudeau's terms by saying that "the State has no business in the bedrooms of the nation." The State must restrain itself from seeking to copy all moral rules. Not only may any legal rule not be moral rule, but all moral rules should not be legal rules. This is so for two reasons. If laws prescribed too complete a morality, because many of us have some trouble following all moral rules all of the time, many people would frequently be in breach of the law. The law would be practically unworkable:

> Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous

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the relevant acts are to play in the legal drama must be scripted....": at 283-284.

[297] If all laws satisfying a State's rule of recognition are not necessarily moral, we cannot say that if a rule is a law it is moral; if a rule is moral it is a law; if a rule is not moral, it is not a law; or if a rule is not a law, it is not moral. This avoids quietism (if it is a law, it is moral, so we had better not change it) and radicalism (if it is not moral, it is not a law, so we had better break it).

> abstain, but the more grievous vices, from which it is possible for the majority to abstain....[298]

If laws made final, penal pronouncements on all moral questions, because of the frequent weakness of our natural light of reason, immorality could be enforced, and moral criticism stifled. I do not say that we cannot tell right from wrong. We can. But neither are we perfect. We can make mistakes. And even where we have a morally proper view, perhaps some other view is of equal or superior moral worth. To maintain society, the worst of the vices must be suppressed. To maintain social development, areas of moral discourse must be left free and open. Social development is good, because it improves the lives of the members of the society. Institutional tolerance for one's neighbour's views is protection of one's own; one's neighbours may tomorrow gain political ascendancy. Hence, moral pluralism must be legally supported.[299]

To be good, any social arrangement must recognize the human rights of each member of the society. A distinction must be made between the recognition of rights, and the satisfaction of those

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[298] St. Thomas Aquinas, ST I-II, Q. 96, a. 2; in MacGuigan at 376. Lord Devlin puts the point by stating that the law should be concerned with the minimum rather than the maximum: Devlin at 19.

[299] "A great democracy must either sacrifice self-government to unity or preserve it by federalism....The co-existence of several nations under the same State is a test, as well as the best security of its freedom. It is also one of the chief instruments of civilization....The combination of different nations in one State is as necessary a condition of civilized life as the combination of men in society....Where political and national boundaries coincide, society ceases to advance, and nations relapse into a condition corresponding to that of men who renounce intercourse with their fellow-men....A State which is incompetent to satisfy different races condemns itself; a State which labours to neutralize, to absorb, or to expel them is destitute of the chief basis of self-government": Lord Acton, quoted in Pierre Trudeau, "New Treason of the Intellectuals" in Federalism and the French Canadians (Macmillan of Canada, 1968) 151 at 179.

rights. Two individuals may have the same set of rights, but one person may, for some reason, have achieved greater fulfilment of that aspect of existence to which the right relates. So long as the less fulfilled individual is not prevented from pursuing his rights claims, the inequality of satisfactions will not impair the good of the society. This sounds formalistic, and it would be, but for one qualification. Each member of the society has a right to pursue his or her good, but that does not mean that each has a right to be an "infinite acquisitor", absorbing all possible satisfactions of the right. Human rights protect human needs. Once those needs are satisfied, a person has no further rights claim; the satisfied person has no right to prevent others from claiming the satisfactions that would be in excess of the satisfied person's needs. A well-ordered, good society, then, is one where each may exercise his or her rights claims, and none holds satisfactions of claims in superabundance:[300]

> Likewise, whatever a man has in superabundance is owed of natural right to the poor for their sustenance. So Ambrose says, and it is also found in Gratian's Decree XLVII: "The bread that you withhold belongs to the hungry; the clothing that you store away to the naked; and the money that you bury in the earth is the redemption and security of the penniless."[301]

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[300] See Appendix "A".

[301] St. Thomas Aquinas, ST II-II, Q. 66, A. 7; in Clark, ed. at 384: "The ethical concept of a man's powers, being a concept of a potential for realizing some human end, necessarily includes in a man's powers not only his natural capacities (his energy and skill) but also his ability to exert them. It therefore includes access to whatever things outside himself are requisite to that exertion. It must therefore treat as a diminution of man's powers whatever stands in the way of his realizing his human end, including any limitation of access": MacPherson, "The Maximization of Democracy" at 7.

(c) the obligation to obey the law

The good is that which promotes the existence of each person. For citizens to act morally, they must promote the common good. Citizens have natural duties to respect the human rights of other citizens. If the State resolves the three forms of conflicts, in accordance with formal morality, and if the State provides moral substantive laws, the State will serve the common good. Actions that follow the rules of the State will promote the common good. If actions that break the rules of the State either directly harm others, or impair the functioning of the rules of the State which promote the common good, such actions will be immoral. If citizens obey the law, they will (to the extent of the morality of the law) respect the human rights of other citizens. Where the rules of the State promote the common good, and breaking the law harms the common good, citizens have a moral obligation to obey the rules of the State, the law: "the virtue of every subject consists in his being well subjected to his ruler"; "Since then every man is a part of the State, it is impossible that a man be good, unless he be well proportionate to the common good...."[302] By acting in accordance with the law, citizens are fulfilling their natural duties to other citizens. Our most important natural duty, says Rawls, is to support and further just institutions.[303]

The obligation to obey the law does not arise unless a threshold test is met. The State must resolve conflict better than citizens could without the State. Life without the State must be worse than life with the State. A State may have a poor judicial system, and may distribute social resources inequitably. But if the State keeps the pale criminal at bay, the State will

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[302] St. Thomas Aquinas, ST I-II, Q. 92, a. 1; in MacGuigan at 363; see Finnis at 357, 359; Rawls at 115.

[303] Rawls at 334; Walzer at 16, 17.

have some moral worth, and its rules should be at least initially respected, so that a dissenter does not eliminate one evil, only to release a greater evil.

The obligation to obey the State requires that the State and other citizens opponents be morally rational. If the State is criminal, it offers no protection from but is an imposition of the conflict of perversity. A citizen's obedience to the law would not serve the common good. So long as a State is not criminal, the prima facie obligation applies not only in cases where the State is nearly just, but even in cases where the State is substantially unjust.

Citizens experience the morality of maintaining and obeying the State and the laws emotionally. Rawls notes this. He describes the "morality of principles", whereby persons come to be attached to just institutions, and desire to act in compliance with them.[304] Conservatives, in particular, appeal to the emotional bond between persons and the State. This appeal is encapsulated in President Kennedy's words "Ask not what your country can do for you--ask what you can do for your country."[305] President Kennedy, like some other conservatives, recognizes that

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[304] Rawls at 473-474.

[305] Friedman claims that the President's ("organismic") imperative "implies that the government is the master or deity, the citizen, the servant or votary": Capitalism and Freedom (the University of Chicago Press, 1962) 1. Friedman, the champion of the "free man" (modelled after Donald Trump rather than the late President), hotly contests the propriety of such a governmental conception. Friedman, I suggest, sets up a straw man. True, recognition of the State as somehow a separate person may lead to an obnoxious subjection of the citizen to the State's general will. But "separate personhood" need not entail evil personhood. The State is, after all, a legal person. The Crown in right of Canada and the Crown in right of the Province of Alberta can sue and be sued, enter into contracts, make donations, tax citizens. Recognition of a "bond" to the State need not entail evil. We recognize that we owe obligations to our parents, but that does not make our parents criminals.

many experience feelings of obligation to their country.[306] Again, reference to emotion is relevant. At bottom, moral responses are akin to emotional responses.

Burke and Socrates illuminate the passion for the State.

Burke opposes the rationalistic politics of the French Revolution with affection for the State:

> On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons; so as to create in us love, veneration, admiration, or attachments.[307]

This affection is like, and is drawn from, our affection for our families:

> We begin our public affections in our families. No cold relation is a zealous citizen. We pass on to our neighbourhoods, and our habitual provincial connections. These are inns and resting-places. Such divisions of our country as have been formed by habit, and not by a sudden jerk of authority, were so many little images of the great country in which the heart found something which it could fill. The love to the whole is not extinguished by this subordinate partiality. Perhaps it is a sort of elemental training to those higher and more large regards, by which alone men come to be affected, as with their own concern, in the prosperity of a kingdom so large as France.[308]

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[306] In the past, thinkers explained this experience, or sought to provoke the experience, by pointing out God behind the State: "every constitution is divine in its principle"; "order is the supreme good...." A. De Maistre, "The Authority of Custom" in Schuettinger, ed. 272 at 278; D. J. Donoso-Cortes at 289.

[307] Edmund Burke, Reflections on the Revolution in France (Markham, Ontario: Penguin Books, 1979) 172.

[308] Burke at 315.

Socrates expresses these sentiments to Crito. Socrates makes Athen's laws and constitution persons. They speak to him. They tell Socrates, who is considering disobedience, that they have raised and educated him; Socrates was their "child and servant". Their suasion is more emotional than rational. But it is rational to recognize the emotional. Socrates' concern to show the true foundation of the citizen's relation to the State explains the anthropomorphism. If Socrates meant only to make a technical moral argument, why introduce the laws and constitution as persons? Why refer to an "agreement" between them and Socrates? Crito could easily have deflated the argument by opposing the personalization of the laws and the constitution, and by denying the agreement. Crito could also have denied that Socrates' escape would cause general civil unrest. Crito makes none of these moves, because he sees that Socrates makes a compelling point. The citizen has affection for the State, as if it were the citizen's parent. This affection points to the citizen's moral duty to obey the law and respect the State.[309]

(d) consent to the State

If I am to talk of an "obligation" to obey the law, citizens must be free to obey or not to obey the law; I cannot speak of obligation where citizens are obliged to do or not to do that

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[309] Many non-philosophers have experienced political affection. It wells up in times of war. A more subtle form of affection arises when we touch our traditional institutions, like the law. I do not suggest that lawyers get lumps in their throats each time they go to court, or each time they read a case. The possibility for the experience is there. Sometimes, outside of the fray of litigation, or outside the dreary labour of preparing documents, a lawyer will feel a sense of place in the old life of the law, and will feel some affection for the rules that support his or her country. Unfortunately, all citizens do not have the privilege of direct contact with the State, without a bureaucratic covering. Nevertheless, love of country is, I believe, a common, if unexpressed and unnoticed emotion.

which I claim they are obligated to do. Citizens are free to obey or not to obey the State. Where citizens do obey the State, in this sense, we can speak of citizens' consent to the State.

This consent is more or less express. The consent and constituting activities of the fathers of the United States was express, as was the nation making of the fathers of the Canadian Confederation. Contemporary citizens express consent by voting. More frequently, consent, like agreement in judgments, is non-dissent (dissent "wears the pants"). Nevertheless, if we are dissatisfied with a State, we may attempt to change it, or leave. In small traditional States, or in modern terrorist totalitarian States, rulers may rule by force. Dissent may mean death or torture. The dividing line between implied consent and sheer coercion is not definite. If I am compelled at gun point, do I consent to the gunman's orders? I think not. Talk of consent to totalitarian regimes makes some sense because persons can do something; resistance is, to some significant degree, possible. Czechoslovakia's President Vaclav Havel recognizes that citizens consent to rule by the State:

> We accepted the system as unchangeable, thus helping perpetuate it. In other words, all of us are--though naturally to varying degrees--responsible.[310]

The scope of pluralism is set by a second form of consent. The first form of consent is to the State as a conflict-resolution mechanism. The second form of consent is to life with some specific set of others. This is consent to live in a State as a country.[311] Moral consensus, with some tolerance of dissent, is a prerequisite for human social life. This second form of consent constitutes a more express moral consensus. Adults with full moral faculties decide with whom they want to live as

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[310] From his Inaugural Speech; see T. Rubin, "Reconciling with the Past" in the Edmonton Journal, March 5, 1990.

[311] Trudeau at 156; "Federalism, Nationalism, and Reason", Federalism and the French Canadians 182 at 184.

neighbours.

Our consent constitutes us as subjects and neighbours. Consent, however, is not consent to any and all State or neighbour behaviour. I must bring my account of morality into the actual lives of citizens--into their confrontation with errors made by the State and other citizens. The correction of error is the aim of civil disobedience. I must also establish the form of moral responses to error, from which civil disobedience may draw its moral justification. To these tasks I repair in the following Chapter.

Appendix "A": The Citizen and Superabundance

I have a house. Others do not. I have food. Others do not. I live in conditions of comparative luxury (from the perspective of the majority of the persons on this planet). Am I immoral? No and yes.

No: I am entitled to promote my own existence as much as the existence of anyone else--I am equally a person. Hence, I may have what is necessary to live a full human life. Furthermore, compared with other persons who have the same real, practical opportunities that I have, I am entitled to the rewards I have accumulated for my efforts. Others could have the same, if they worked as hard, or if they took the same risks.

Yes: "When he comes back home from work with some money I even cry. I look at the situation with my daughters--no shoes, hungry, and no one to help us. I have to do something, so I go fishing with my husband, and try to get something, but life is really difficult. Sometimes I feel like getting a gun and going out stealing things. The salary does not go up, and he comes home very tired."[312] Plenty of other people have no real opportunities. They do not lose the competition. They cannot compete. Can I sit with a full stomach and a fat paycheck, and feel moral comfort? I am, I believe, living in sin. My affluence--and the affluence of the developed world--in the face of the misery and poverty of the majority of the persons on this planet is a disgrace.

What should I do? I am doing a little with my tax dollars. Canada pays out some of its revenues (not enough) in foreign aid, and supports various projects in the developing world. Tax dollars are used in domestic social aid programs. Should I give away everything I do not need to the poor? This would be a

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[312] Wife of a cane cutter, North East Brazil, 1986, in Jon Bennett, The Hunger Machine: The Politics of Food (Toronto: CBC Enterprises, 1987) 150.

counsel of perfection. I submit, however, hopeful that I am not in bad faith, that the issue is not as simple as divestiture.

First, not all need to be treated in exactly the same way. So long as all can live decent lives--lives lived according to the interpretations of the good life of the particular community, not according to our interpretation--morality is served.[313]

Second, to permit all persons to live decent lives, some transfers of wealth from the developed nations may be necessary. The difficulty is to determine the manner in which our aid is to be given. A great problem with our aid programs is that the programs may harm developing nations more than the programs assist them. The problem is to be solved not only by morality, but by technical economic, sociological, and anthropological analysis.

I submit that the main issue is not the transfer of wealth from us to the poor: the main issue is the freedom of the poor to live decent lives according to their own lights--and the land of the poor may be, generally, sufficient to permit this life. My obligation, as a concerned citizen, is to develop and exercise the influence I have to compel our government and the governments of other countries to set their people free.

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[313] See Ivan Illich, "The Three Dimensions of Public Choice" in Shadow Work 9ff.

CHAPTER 5: ERROR

Civil disobedience occurs when the State ceases to do its job, when the State or the moral consensus breaks down. A person offended by a breakdown must decide how to respond to the breakdown. Civil disobedience may be one moral response, depending on the circumstances of the breakdown. In this Chapter, I consider the types of breakdowns which can occur, and the conditions for moral responses to breakdowns.

5.1-breakdowns

The State and the law may break down in three main ways.

The first type of breakdown occurs when a State is not just, when its formal workings break down. The State departs from the publicly recognized standards of justice.[314] Injustice is immorality of the formal, structural elements of the State, with the processes leading to or involving laws. For example, persons have political rights; some group may be denied the right to vote, or the votes of members of the group may not be equivalent to the votes of other members of the society. Again, persons have a right to equality before the law; some group may meet with discriminatory treatment by the Courts. An abuse of discretion by an organ of the State, or a purported exercise of power outside of the authority of the organ are also examples of injustice. The rules providing for processes leading to State determinations are broken, with the risk that persons may not be treated fairly by the organ. Such breakdowns breach human rights relating to equality before the law.[315]

The second type of breakdown occurs when the State or the laws make a particular determination that some person or persons

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[314] Rawls at 352.

[315] Finnis at 353.

judge to be in moral error. Here the complaint is with the result of legal decisions, rather than with the processes leading to the decisions. The State has not been unjust. For example, a government may make an immoral law, although it permitted free discussion, and gave each person a vote. The error would occur in an area or concerning a subject recognized as being within the competence of the decision-maker. We can all think of legal decisions we do not like: our problem is with the legal result, not with the decision-maker addressing the issue. Such breakdowns breach human rights relating to aspects of human existence to be promoted through the State.[316]

While breakdowns of the first and second types involve violations of the human rights which should be protected by the State, breakdowns of the third type are not primarily breakdowns in the operation of the State, but in the moral consensus. Persons who had agreed in their judgments cease to agree in their judgments. The State is drawn into the breakdown when it attempts to resolve the conflict between the differing judgments. This will involve an expansion of the conflict resolution mechanism of the State beyond previously understood bounds. Unlike errors of the second type, the errors are viewed to occur in an area or concerning a subject that dissenters do not recognize as being within the competence of the State. The problem here is that the State decides an issue which it should not have considered at all.[317]

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[316] see Rawls at 352; Finnis at 352, 353.

[317] Breakdowns in the moral consensus are more prevalent in North American society than may be recognized. For example, we encounter the symptoms of such breakdowns in the inability of the State to function satisfactorily concerning the pornography (sex and violence) and hate literature issues. Freedom of speech, thought, and expression confront freedom from oppression, exploitation and violence. Different groups have come to judge the promotion of persons differently (I am not saying that both are right). The opposed groups do not have sufficient common ground to be satisfied by an adverse legal decision. Both groups agree that the freedoms of speech, thought, and expression are

Breakdowns in the moral consensus differ from breakdowns of the first and second types in the corrigibility of the breakdowns. The first and second types of breakdowns are errors judged in relation to publicly recognized standards. The breakdowns are departures from these standards. The corrigibility of such breakdowns lies in the reference to these standards. If a breakdown in the moral consensus occurs, publicly recognized standards cannot be appealed to--no relevant accepted standards exist. At this point, two conclusions are possible: either no further standards exist or deeper standards, underlying the divergence of moral judgments, exist. If the former conclusion is drawn, the breakdown is not corrigible, in the way that a departure from a standard is corrigible. A "correction" could be achieved, if divergent judgments ceased (by conversion or suppression of those who judge differently than the successful judges). If the latter conclusion is drawn, the correction of divergent judgments may be possible, if all parties come to recognize the deeper standards which should apply to their judgments.

5.2-responses to breakdowns

When the citizen feels that he or she confronts error, whether of the State or of other citizens, the citizen must decide what he or she is going to do about the apparent error. The citizen may not be inclined to do anything. I will assume that a citizen's interests are sufficiently engaged so that some response to the apparent error is elicited.

The citizen's response will have two main components.

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vital to the promotion of persons. But those opposed to pornography and hate literature do not perceive that the promotion of persons is served through the challenged modes of expression. Moral unity, the presupposition of collective political existence, may be vanishing.

First, the citizen must determine whether a breakdown has occurred, or whether his or her initial impression was mistaken. To perceive the error will be to perceive what is morally good, even if what is good is to do nothing, rather than what the State or others are doing or proposing to do. Second, the citizen must decide upon the steps he or she will take to correct the error.

(a) judging morality

Judging the morality of State actions and the morality of other citizens' judgments may be difficult practically. Political issues tend to be beset by hysteria, exaggeration, and falsehood, on all sides.

The challenged law or State behaviour must be compared with the interpretation of the good: does it promote the existence of persons?; then with the general moral purpose of the State: does it resolve some conflict consonant with the common good? The merits of the law or behaviour must be examined: is it a reasonable resolution (whether the citizen likes it or not)? The moral judgments of others must be similarly examined: do their judgments promote the existence of persons?; if the matter is not clear, are the moral judgments of others reasonable judgments? These examinations should follow the principles of moral rule-following which I discussed above.[318] One's examinations may lead only to a negative conclusion that the State or others are wrong; or one's examinations may disclose the proper resolutions or judgments of the matter.

If the State or others have erred, the citizen must consider how far his or her tolerance of the error extends. By consenting to live under the State, a citizen consents to be bound by the rules and decisions of the State. A citizen is not guaranteed that any particular rule or decision will be in his or her

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[318] in section 3.2.

favour. Because of conflict, the State was required. It is to resolve conflicts. A citizen is not entitled to reject the State so long as the State is doing the job it was designed to do. Neither is a citizen guaranteed that the State will not make errors. Politicians, judges, and bureaucrats are fallible. Were citizens too quick to condemn and reject the State for errors, no State would long survive, and the good of each to be secured by the State would be lost.[319] Similarly, by consenting to live in a community, a citizen consents to a conflict of moral opinions with his neighbours. If a citizen wants pure morality, he can live in a commune, a monastery, or a colony. Otherwise, the conflict of opinion is the proper state of the community, and the citizen may have no cause to complain.

The boundaries of tolerance are marked by the citizen's judgment of the degree of moral harm posed by the breakdown. "Moral harm" is damage to any of the aspects of a person's or persons' existence, morally conceived. Where either the risk of moral harm is great, or there is risk of great moral harm, the citizen may feel compelled to attempt to correct the breakdown.

When the citizen's tolerance is exceeded, he or she will act. The citizen must then determine the proper means to redress the error.

(b) whether means should be moral

By "proper means" I mean morally proper means. Should I worry about the moral propriety of means, or should I only be concerned with the effectiveness of means?

Machiavelli teaches that effectiveness, rather than moral propriety, is the prime concern.

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[319] Rawls at 355.

Machiavelli, unlike Nietzsche, never calls "good evil or evil good."[320] Machiavelli does not deny the validity of morality. He does exclude certain acts of the prince from moral criticism.

Machiavelli founds his interpretation of morality on his observations of people:

> One can make this generalization about men: they are ungrateful, fickle, liars, and deceivers, they shun danger and are greedy for profit; while you treat them well, they are yours. They would shed their blood for you, risk their property, their lives, their children, so long... as danger is remote; but when you are in danger they turn against you.[321]

Those seeking to change the laws, therefore, cannot depend on fair play from opponents. Moral action has little chance of success:

> the gulf between how one should live and how one does live is so wide that a man who neglects what is actually done for what should be done learns the way to self-destruction rather than self-preservation.[322]

> You should understand, therefore, that there are two ways of fighting: by law or by force. The first way is natural to men, and the second to beasts. But... the first way often proves in qua[323]

Hence, to succeed, morality may be suspended:

> The fact is that a man who wants to act virtuously in every way necessarily comes to

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[320] Jacques Maritain, "The End of Machiavellianism" in The Range of Reason (New York: Charles Scribner's Sons, 1952) 134 at 139.

[321] Nicolo Machiavelli, The Prince, trans. G. Bull (Harmondsworth, England: Penguin Books Ltd., 1971) 96.

[322] Machiavelli at 91.

[323] Machiavelli at 99.

> grief among so many who are not virtuous. Therefore if a prince wants to maintain his rule he must learn how not to be virtuous, and make use of this or not according to his need.[324]
>
> So a prince must understand how to make a nice use of the beast and the man... a prince must know how to act according to the nature of both, and that he cannot survive otherwise.[325]

Machiavelli's teaching may be applied to bad[326] or good ends. A politician hungry for power alone could play the beast to obtain power; a group seeking (allegedly) moral ends might also play the beast. Environmentalists who spike trees, and animal rights activists who commit arson and use car bombs have embraced Machiavelli.

Saul Alinsky is one activist who gives the appearance of being more Machiavellian than Machiavelli.[327] Alinsky approves of Machiavelli's teaching. We must see the world as it is, not as we would like it to be. And the world is corrupt and bloody.[328] Alinsky moves beyond Machiavelli by advocating the dress of

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[324] Machiavelli at 91.

[325] Machiavelli at 99.

[326] Thomas Merton, "The Christian in World Crisis" in The Nonviolent Alternative 20 at 47.

[327] In fact, Alinsky is something of an anarchist moralist. Despite his skeptical and relativist talk (see Alinsky at 4, 11, 14, 31), he promotes equality, justice, freedom, peace, the preciousness of human life: Alinsky at 12, 15, 16, 46, 132. He opposes poverty, misery, delinquency, disease, despair, unhappiness, hopelessness: Alinsky at 113. He does not recommend raw power tactics. He cautions radical youth to work inside the system, and warns against impatience: Alinsky at xx, xxi. The tactics he describes, while sometimes odd or provocative, are not violent or excessively careless of the rights of others: see Saul Alinsky, Reveille for Radicals (New York: Vintage Books, 1969) passim.

[328] Alinsky at 12, 24.

tactics in moral garb: "All effective actions require the passport of morality."[329] Alinsky teaches that when we play the beast, we must appear to be virtuous. I referred above to some of Alinsky's reflections on the use of moral descriptions. The essence of the reflections is that to win, we must do whatever winning takes; and the means we use we shall call moral. The activist is in a war. In war, no rules of fair play apply. In life or death circumstances, life or death tactics must be used.[330]

The Machiavelli-Alinsky position has four weaknesses.

First, if the description of the way the world is were accurate (men are ungrateful, fickle, etc.; the world is corrupt and bloody), their position would come close to being acceptable, without more. I submit, however, that other persons are not entirely as Machiavelli and Alinsky paint them. I myself have pointed to the pale criminal in persons, and the conflict from perversity which he engenders; but I have also argued that persons are constituted as persons in community, through moral consensus, by cooperation. Our cooperation is as important--more important--to our lives than conflict. Alinsky and other activists cannot be consistently Machiavellian, since they do not judge members of their own team to be as other persons. Organized activism depends on the cooperation of participants. Machiavelli's teaching is for individual not corporate princes. Furthermore, I have claimed that humans have natural moral responses to others. At any particular time, these responses may be suppressed, but in some (normal) cases, humans will, because

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[329] Alinsky at 44, 43. Machiavelli does not dispute the desirability of appearing moral: "To those seeing and hearing [the prince], he should appear a man of compassion, a man of good faith, a man of integrity, a kind and a religious man": Machiavelli at 101; on the other hand, the prince "must not flinch from being blamed for vices which are necessary for safeguarding the State": Machiavelli at 92.

[330] Alinsky at 29, 133, 134, 135.

they are humans, behave morally. If persons are not entirely the way Machiavelli and Alinsky describe them, we should not adopt the tactics and attitudes towards others that Machiavelli and Alinsky prescribe. I qualify this by admitting that human facts may approximate the descriptions of Machiavelli and Alinsky, when, for example, persons are at war.

Second, if the way of beasts were effective, the Machiavelli-Alinsky view could be acceptable. I deny that such action is truly effective. The effectiveness may be considered from the perspective of others and of the prince. The use of non-virtuous action against others may not be effective. Either others will know the prince has been a beast, or they will not. If they do not, the ends sought by the prince should be fairly stable, since others will not respond with anger or hatred to the actions of the prince. Machiavelli does warn the prince to avoid being hated.[331] If a prince uses non-virtuous tactics, to avoid hatred by others, he must somehow hide or distract attention from the lack of virtue. Resources must be spent to maintain the fictions preventing hatred. Even if others are easily and happily deluded, that is only arbitrary: others may as easily realize that they have been duped, and react in hatred and anger. The prince becomes the prisoner of fictions he must maintain. If others know that the prince has dealt with them without virtue, they will respond with anger or hatred. The prince can only keep hostility in check (if he does not apologize and make amends, and behave virtuously thereafter) by force. The prince is not spared worry if his non-virtuous action is directed against only a minority: the non-virtuous action is generalizable; it could be as easily directed against all others; the confinement of the non-virtuous action is arbitrary--and once others realize this, the prince will face universal hostility. The prince is in the position of the tyrant, as analysed by

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[331] Machiavelli at 102.

Plato:

> So the despot's condition, my dear Glaucon, is supremely wretched....Whatever people may think, the actual tyrant is really the most abject slave, a parasite of the vilest scoundrels. Never able to satisfy his desires, he is always in need, and, to an eye that sees a soul in its entirety, he will seem the poorest of the poor. His condition is like that of the country he governs, haunted throughout life by terrors and convulsed with anguish.[332]

Third, if persons are not as Machiavelli and Alinsky describe, and if the methods they prescribe are not effective, we have no reason not to judge the means to our moral ends in terms of morality. Neither means nor political action possess any moral immunity. We are not prevented from judging means morally; we should judge means morally.

Finally, Machiavelli ought to be rejected, or at least limited, because of the dangers posed by resort to the beast in man. This is the same response as that to Nietzsche: a prince or the civilly disobedient free from morality would be free to become the overman. Machiavelli's theory takes us away from ordinary humanity.[333]

Moral judgment cannot be barred from exposing immoralities of political action. We would lose too powerful a weapon against evil.

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[332] Plato at 305-306 (IX.578-579).

[333] Bloom thinks that Machiavelli had a sufficient knowledge of the evils that men do: "[The Enlightenment philosophers, including Machiavelli,] did not according to [the] popular view, understand the ineradicable character of evil, nor did they know, or at least take sufficient account of, the power of the irrational of which our later, profounder age is so fully aware. In these pages, I have tried to show that this is a skewed and self-serving interpretation": Bloom at 291. Either Machiavelli saw the worst in man or he did not. If he did not, then our modern experience prevents us from adopting Machiavelli fully and consistently. If he did, he should not have turned us back to the beast in man; better, he should not have attempted to turn men into beasts.

(c) judging means

The citizen should consider the morality of his or her response to immorality. A primary question for the citizen considering his or her response is whether the response should involve legal or illegal procedures.

The State has official and unofficial legal procedures for correcting error. The official procedures involve the three branches of the State. Citizens may work through or with the executive, the legislature, or the judiciary. The unofficial procedures are constituted under the rights of freedom of speech, including freedom of the press, and freedom of assembly. The unofficial procedures include writing newspaper or magazine articles, books or pamphlets; making speeches; holding rallies or prayer vigils; picketing legally; acting in street theatre. The scope of legal unofficial activities is bounded only by the laws of nuisance, trespass, and defamation, and participants' imagination.

Legal procedures may be ineffective for three reasons, corresponding to the three sorts of error. Where formal justice has broken down, dissenters may be unable to voice their concerns through the legal procedures either at all, or on an equal footing with other citizens. Where the substantive morality of the State has broken down, the legal procedures, despite their availability, have failed to give the dissenters an adequate opportunity to rein in the immorality. Where the moral consensus has been breached, the legal procedures may either be in the hands of those whom the dissenters oppose, or the messages which can be sent through the legal procedures are not adequate to reach or convert those whom the dissenters oppose.

Citizens have a *prima facie* obligation to utilize legal procedures to correct error. This follows from the *prima facie*

duty to obey the law.[334] The prima facie duty to use legal procedures applies only if two conditions are met. First, the State and the citizen's opponents must be morally rational. If a citizen's opponents are not morally rational, the citizen may be compelled to take steps in self-defence which exceed the normal legal procedures for addressing error.

Second, breaking the law must be a threat to the common good promoted by the State. This is a problematic condition. On the one hand, conservatives frequently react to law-breaking as if every act of law-breaking posed a grave threat to the social order. The Laws cross-examine Socrates:

> Can you deny that by this act which you are

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[334] Dworkin observes that where we have a legal right (a right "in the strong sense") to do some act, the government cannot interfere with the performance of that act. This is true. Dworkin argues that the scope of our legal rights is broader than the rights which may at any moment be recognized by the legislatures and Courts. Dworkin's position is as follows: Where no rule dictates a legal result, Courts may have recourse to principles. Courts interpret principles, and render decisions based on their interpretations of principles. Because the principles and the interpretations the principles found subsist prior to actual judicial declarations of rights, Dworkin claims that legal rights, determined by interpretation, do not depend on actual judicial declaration, but can be said to subsist apart from judicial declaration. Dworkin claims that "a citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires": Dworkin at 214 (a position Dworkin is led to by his coherence/constructivist theory). Dworkin claims that persons have legal rights to disobey particular laws; the government can have no more right to prevent the disobedience than it can have to interfere with a judicially declared or legislated right: Dworkin at 192. The citizen has no duty to obey the law when the citizen has the right to act without government interference. Dworkin's position presupposes that principles are law, a presupposition which I rejected above. The scope of legal rights is not as broad as Dworkin claims. In controversies with the State, citizens may have no legal right to oppose the State. If citizens have no legal right to disobey the State, the question remains whether the citizens have a moral right to disobey the State--Dworkin's rights in the "weak sense", and the subject of my investigation: Dworkin at 210, 87, 196.

> contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?[335]

President Kennedy voices this fear:

> ...our nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny.
>
> The law which we obey includes the final rulings of the courts as well as the enactments of our legislative bodies. Even among law-abiding men few laws are universally loved.
>
> But they are universally respected and not resisted.
>
> Americans are free, in short, to disagree with the law, but not to disobey it. For in a government of laws and not of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law.
>
> If this country should ever reach the point where any man or group of men, by force or threat of force, could long deny the commands of our court and our constitution, then no law would stand free from doubt, no judge would be sure of his writ and no citizen would be safe from his neighbours.[336]

The conservative may make an argument from emotion. The conservative relies on the citizen's emotional bond with the State which I identified above. This emotional argument is express in the Crito:

> Both in war and in the law-courts and

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[335] Crito at 89-90.

[336] New York Times, Oct. 1, 1962, 22; quoted in R. Wasserstrom, "The Obligation to Obey the Law".

> everywhere else you must do whatever your city and your country commands, or else persuade it in accordance with universal justice; but violence is a sin even against your parents, and it is a far greater sin against your country.[337]

Your father and mother may have made decisions you did not like. That did not justify your rejection of their authority. You could have tried to convince them of their error by (respectful) argument, but that would have been the extent of your dissent. If the State is one's "parent" too, one should have similar respect for the State, and should similarly restrict one's dissent to argument.[338]

On the other hand, Dworkin condemns recourse to the "threat" to society. This threat is purely speculative; no evidence supports the claim of threat.[339] Goodman claims that, as a matter of fact, law-breaking may have social benefits:

> On sociological grounds, indeed the probability is that a specific direct action, that cuts through frustrating due process, and especially if it is successful or partially successful, will tend to increase civil order rather than to destroy it, for it revives the belief that the community is one's own, that one has influence; whereas the inhibition of direct action against an intolerable abuse inevitably increases anomie

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[337] Crito at 91.

[338] The problem with the parent analogy is that it yields the proper conclusion only so long as the natural/State parents are behaving more or less morally. An immoral parent does not deserve respect.

[339] Dworkin at 195, 196, 202, 246, 261; Walzer at 17. Dworkin declares that social threat (which Dworkin consistently but erroneously interprets as a threat to the general good rather than as a threat to other persons) is, moreover, irrelevant. Rights cannot be overridden by utilitarian gain. This declaration depends on Dworkin's view of legal rights, which I have argued is wrong.

and therefore general lawlessness.[340]

Should I speak of threat to society, or should I wait until I have evidence of a threat? Are the fears of conservatives empirically baseless?[341]

I can speak of threat to society; the appeal to evidence bespeaks confusion. Conservatives have justifiable fears. Those who oppose the conservatives lack philosophical perspective.

Recall that philosophy deals in interpretations. Philosophy is not science; philosophy is not experimental. Philosophy does not wait on new facts. Philosophy interprets the facts before us. Philosophy considers the ideas, the concepts that function in philosophical interpretations. Philosophy probes the consequences and implications of those ideas. Interpretations are judged on their own conceptual merits. To limit ideas by the way people might happen to act out those ideas is to introduce arbitrary elements into interpretations. To defend against the perception of the threat of a theory by alleging that people will not consistently follow the theory is to admit that the theory does not actually explain the behaviour of people. The theory is saved by what is not accounted for by the theory.

I put this to Dworkin: Suppose that two groups of people read Taking Rights Seriously. One group immediately breaks into bizarre and continuous civil disobedience. Would the evidence prove that Dworkin's theory is socially dangerous? It would not. Certainly the facts must be considered by interpretations. The facts of disobedience, though, need not be explained by the influence of a book. The other group, which had been boisterously civilly disobedient immediately before reading, ceases to break laws, and continues ever after to live in perfect

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[340] Paul Goodman, The Moral Ambiguity of America (Massey Lectures, Sixth Series) (Toronto: C.B.C. Publications, 1966) at 84-85.

[341] Another way to put the question is, Can we do philosophy?, or Can we only do empirical studies?

law-abidingness. Would the evidence prove that Dworkin's theory is not socially dangerous? It would not. The facts of law-abidingness need not be explained by the lack of influence of a book. The evidence is not determinative. The evidence must be explained by interpretations. Interpretations, not the subject of interpretations, are to be evaluated and rejected or accepted.

When considering whether an interpretation poses a social threat, the implications of the interpretation--its effects in the realm of ideas--must be explored.

I interpret law-breaking to pose a threat to the common good for two reasons. First, by their nature, moral claims are generalizable. If I may morally perform some act, then unless your circumstances display some morally relevant difference, you may also perform that act. An act of law-breaking by one citizen is, potentially, the act of law-breaking of all citizens. An act of law-breaking sets a precedent that others may follow. Hannah Arendt notes that

> It is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind stays with mankind as a potentiality long after its actuality has become a thing of the past....once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been....the unprecedented, once it has appeared, may become a precedent for the future....[342]

Second, persons harbour the pale criminal. Law-breaking cannot be interpreted without recognition of its allure to those who are uninterested in preserving the common good.

Law-breakers, however, may address the generalizability problem created by law breaking. Law-breaking can be morally contained. Citizens may break the law, without threatening the common good, if they are able to satisfy the conditions for moral

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[342] Eichmann in Jerusalem (Markham, Ontario: Penguin Books, 1977) 273.

law-breaking.

The prima facie obligation to obey the law and to use legal procedures to correct error are overcome only if the law-breaking does not harm the common good to a greater extent than the error combatted. This is a necessary, but not a sufficient condition for moral law-breaking. Moral law-breaking must satisfy additional criteria to be moral.

The additional criteria for moral law-breaking are that the law-breaking must be directed at the source of the immorality, appropriate in the relevant time constraints, proportional to the immorality combatted, and effective.

The root of the direction-at-source criterion is our natural duty to act to promote the existence of other persons. If a person is promoting his or her own existence, and not impairing my existence, I have no right to interfere with that person; I am obligated not to interfere with that person. If a person is impairing my existence, I have no right to interfere with the existence of a person other than the person impairing my existence, even if that interference might spare me of my impairment. If a person is impairing my existence, he or she is not acting morally. If he or she is not acting morally, I have no obligation not to interfere with that person to stop the impairment; I have a right to interfere with that person. Morality requires us to direct our responses to the source of the immoralities combatted. Nagel notices this feature of moral responses to immorality: "hostility or aggression should be directed at its true object."[343]

A moral response must be appropriate in the relevant time constraints. Urgent circumstances may require a direct and strong response. On the other hand, the complexity of issues may bar hasty action.

A moral response must be proportional to the immorality

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[343] Thomas Nagel, "War and Massacre" in Mortal Questions 53 at 66.

combatted. The moral licence is to block the immoral act, and to preserve one's own existence. So long as the opposition to the immoral act is directed at that act and is a reasonable attempt to prevent the immorality caused by that act, the opposition will remain moral. Thus, force may be countered by force--not because injury to others is justified, considered in itself, but because opposition to an immoral action, such opposition being moral, may have as a consequence the injury of a person. Where immoral action may be opposed without causing injury to persons, injury to persons cannot be justified. If force may be met with force, passivity may not be met with force. If a response is not a reasonable response, the response passes into immorality. Stephen writes that (State) compulsion is bad "When the object aimed at is good, and the compulsion employed is calculated to obtain it, but at too great an expense"; "To compel people not to trespass by shooting them with spring guns is bad, because the harm done is out of all proportion to the harm avoided."[344]

Finally, a moral response must be effective. I do not say that the end justifies the means. Rather, if the end cannot be achieved by the means, the means should not be employed. Stephen has noted this condition of moral responses to immorality. He writes that (State) compulsion is bad "When the object aimed at is good, but the compulsion employed is not calculated to obtain it";

> To inflict a punishment sufficient to irritate but not sufficient to deter or to destroy for holding particular religious opinions is bad, because such compulsion is not calculated to effect its purpose,

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[344] Sir James Fitzjames Stephen, "Rejoinder to Liberal Dogma" in Schuettinger, ed. 306 at 312. This is recognized by the law, in the self-defence against unprovoked assault provisions, which justify the reasonable use of force to repel an attack, and in the excessive force provision, which imposes criminal liability for unreasonable uses of force during otherwise authorized uses of force.

assuming it to be good.[345]

This criterion suggests an empirical interpretation: what are the chances of success? Philosophy, though, does not deal in calculations of probabilities; to make claims concerning probabilities, empirical research is required.

If an act of law-breaking meets the foregoing criteria, and does not impair the common good more than the immorality combatted, the act of law-breaking will be moral.

With this Chapter, I have completed my account of the moral foundations of civil disobedience. In the following Chapter, I must establish civil disobedience as a species of moral law-breaking.

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[345] Stephen at 312.

CHAPTER 6: MORAL LAW-BREAKING AS A RESPONSE TO ERROR

If the State or other citizens are in error, the citizen being convinced that error has occurred, and if legal procedures have not availed against the error, the citizen may consider action against the error morally necessary. In this Chapter, I consider the species of moral law-breaking as responses to error, and the differentiation of the species by the type of interference with the citizen caused by the error and the extent of the moral consensus or consensus in constitutional judgments.

6.1-conscientious objection

(a) definition

When the State compels a citizen to do or to refrain from some act and the citizen views the compulsion as immoral, on pain of acting immorally himself or herself, the citizen must refuse to do that which the State directs. This is conscientious objection:

> Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.[346]

This form of moral law-breaking is distinguished from other species of moral law-breaking by its resistance to direct State compulsion.

This form of law-breaking is not distinguished by being "conscientious", or based on moral considerations. All the forms

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[346] H. D. Thoreau, "Civil Disobedience", in Walden and Civil Disobedience (New York: W. W. Norton and Co., 1966) 224 at 225.

of illegal activity I discuss are based on moral considerations.

This form of law-breaking is not distinguished by being "individualistic". Great conscientious objectors, like Socrates or Thoreau, were alone. That was a function of their courage, not the essence of their political activity. Others had not the courage to follow them--in Socrates' case, to follow him even unto death. Conscientious objectors may do their objecting in groups or organizations. The Quaker pacifist objectors to the Vietnam war gave an example of group conscientious objection.

Conscientious objection is not "unpolitical". Thoreau is not Arendt's lazy objector. Thoreau writes: "Action from principle,--the perception and the performance of right,--changes things and relations, it is essentially revolutionary";[347] "Let your life be a counter friction to stop the machine [of government]"; "What I have to see, at any rate, is that I do not lend myself to the wrong which I condemn."[348] This is the hand-washing Thoreau recommends to opponents of slavery:

> I do not hesitate to say, that those who call themselves abolitionists should at once effectually withdraw their support, both in person and in property, from the government of Massachusetts, and not wait till they constitute a majority of one, before they suffer the right to prevail through them. I think that it is enough if they have God on their side, without waiting for that other one. Moreover, any man more right than his neighbours, constitutes a majority of one already.[349]

Socrates too scught to change his listeners. He was not interested only in himself. His message was for all persons:

> Where a man has once taken up his stand, either because it seems best to him or in obedience to his orders, there I believe he is bound to remain and face the danger,

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[347] Thoreau at 230-231.

[348] Thoreau at 231.

[349] Thoreau at 232.

> taking no account of death or anything else before dishonour.[350]
>
> Are you not ashamed that you give your attention to acquiring as much money as possible, and similarly with reputation and honour, and give no attention or thought to truth and understanding and the perfection of your soul?[351]

Socrates is not reporting on what is just for him alone.

Conscientious objectors are not more prone to accept the penalty for the illegality of their actions than other moral law-breakers. Thoreau went to jail. He does not comment on why he accepted the penalty, save to claim that jail was not the punishment that the State may have thought.[352] Socrates drank the hemlock. Socrates' acceptance of the penalty was not so much an acceptance as a non-resistance. Socrates' weapon, the only weapon he regarded as moral in his circumstances, was persuasion. When he failed to persuade his jury, his weapon was spent. He had no moral course of action left open to him.[353] For Socrates to have promoted the life of reason before the jury, and then to have employed force (or its equivalent) to break out of jail, would have been inconsistent. Socrates' acceptance of the penalty was caused by his general moral position, not by the course of political action he took.

(b) justification

When the State attempts to compel a citizen to be immoral, the error of the State threatens immediate moral harm to the

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[350] Apology at 60.

[351] Apology at 61.

[352] "I could not help being struck with the foolishness of that institution which treated me as if I were mere flesh and blood and bones, to be locked up": Thoreau at 236.

[353] see Crito at 91.

citizen. The State threatens to make the citizen immoral. This may exceed the bounds of the citizen's tolerance.

Legal procedures for addressing the error may be unsatisfactory because their use would take too long. The citizen would not be prepared to act immorally for a while, until he or she managed to convince the people and the government that a correction of a breakdown is necessary. Furthermore, the citizen may not be content with an adverse legal decision. The citizen is driven to an illegal response to the error.

Of the species of illegal responses to immorality, conscientious objection creates the least threat to the common good. The precedent set by conscientious objection applies only to peculiar circumstances. A citizen must be compelled to do or to refrain from doing some act. The citizen must have a moral reason for not obeying the demand of the State. Moreover, the objector will not directly harm others, since he or she chooses only not to obey the law, not to interfere with other persons. In many cases of conscientious objection, because of the nature of the moral positions supporting the objection, the objector will be bound by moral consistency to "accept" or not to resist the penalty (however the penalty is understood).

Conscientious objection can satisfy the other moral criteria for illegal responses to immorality. Conscientious objection is directed at the source of the immorality, the wrongful State command. Conscientious objection may be appropriate in the time constraints, since the objector may face an immediate compulsion to act immorally. Conscientious objection may be proportional to the evil to be averted: the evil was to do the act; the objector does not do the act.[354] Conscientious objection accomplishes its immediate aims exactly. The evil is not done. The political

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[354] My only concern is whether, if the evil is great, conscientious objection may be too limited a response. See, on Quaker conscientious objection, R. W. Tucker, "Revolutionary Faithfulness" in Martin E. Marty and Dean G. Peerman, edd. New Theology No. 6 (Toronto: The Macmillan Company, 1969) 199 at 220.

purposes of the objection have no guarantee of fulfilment. But then, no other political attempts have that guarantee.

6.2-restorative civil disobedience

When the State does not compel a citizen to be immoral, the error complained of may be unequal treatment by the State of a group to which a citizen belongs, or the pursuit by the State of immoral policies, not affecting the citizen more or less than other citizens. These are breakdowns of the first and second types identified above.[355]

The degree of tolerance of error depends on the sort of error committed by the State. Citizens should be less tolerant of unequal treatment than of immoral policies.

Where citizens are not treated equally, their right to be treated equally as persons is violated. The State is to promote the good of each. If it discriminates against a group of persons, the State is manifestly failing in its proper function.

Where citizens take the position that State policies are immoral, the citizens should consider that questions of policy may have wide scope for reasonable differences of opinion. The differences of opinion are to be expected in a community, a community in which the citizens have consented to membership. If citizens have not been prevented from obtaining recourse to State decision making through the official and unofficial procedures, and where others have had an equal ability to influence State decision making, even where citizens strongly dissent from some policy, moral caution dictates that the properly made decisions of the State be respected.[356] Furthermore, since others are affected to the same extent as the citizens, others' acceptance

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[355] In part 5.1.

[356] Rawls distinguishes between civil disobedience motivated by injustice, and civil disobedience motivated by State policies, the latter being the more difficult to justify: Rawls at 372.

of the State action is an indication (not decisive) of its tolerability.

Where citizens are not treated equally, they will probably not have the ability, or the full ability, to correct the State error through the official and unofficial procedures. Where citizens complain of State policies, they may have access to the official and unofficial procedures as favourable as that of others. Citizens who are treated unequally will probably find the official and unofficial procedures more unsatisfactory, and will determine this more quickly, than citizens who complain of State policies. But even if citizens have ready access to the government's ear, it may not listen. Legal means of addressing error may prove fruitless and insufficient to combat the immorality.

Citizens may be driven to civil disobedience.

If the disobedient assume that other citizens share certain convictions with the disobedient, and that other citizens and the government are rational, so that non-violent political activity may be effective, and if the immediate aim of the disobedient is to appeal to the convictions that others share with the disobedient for the ultimate aim of correcting State error, the civil disobedience employed will be "restorative civil disobedience."

(a) definition

"Restorative civil disobedience" may be defined as the public breaking of particular positive laws by a citizen or citizens of a State following some standards, shared by most or all other citizens, and judged to be superior to or to permit the breaking of the laws broken, to change the law or the policies of the State.

This is a descriptive, not a normative definition. That is, I do not attempt to define restorative civil disobedience as

morally proper civil disobedience, but simply as a mode of political behaviour, which may or may not be morally proper. Attempts to build a moral evaluation into the definition of civil disobedience confuse the investigation into what civil disobedience is, with the investigation into whether civil disobedience may be, in some circumstances, moral. On my approach, certain oft-repeated "essential features" of civil disobedience are seen not to be essential features of civil disobedience, although these features may--as will be discussed below--be indicators of the moral proprietary of the civil disobedience.

My comments on the elements of the definition are as follows:

(A) "breaking particular positive laws": Civil disobedience is a form of law-breaking.[357] The disobedient may break few or many positive laws. The restorative disobedient will usually have fairly focused complaints and activities of law-breaking. The restorative disobedient intend to engage the shared views of other citizens. Since the views of the disobedient and other citizens are similar, and since the State reflects the consent of its citizens, the State ought to conform, in large part, to the moral expectations of its citizens. If the State does not largely conform to the moral expectations of the disobedient, the disobedient may have less common moral ground with other citizens than they might think. The restorative disobedient will perceive the State to have some features that are good, and the disobedient will wish to preserve these features of the State. The exception to this generalization would occur when the State is imposed on and despised by most citizens. The disobedient and other citizens could have significant common moral ground, even though many laws, if not

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[357] The law-breaking is intentional; I cannot imagine an instance of negligent or inadvertent civil disobedience.

the State itself, were challenged.[358]

Some may argue that a purported law which breaches either constitutional principles or human rights is no law at all; hence, to break the purported law is not to break the law: "no human law which conflicts with the Divine law is a law."[359] If the disobedient do not break "true" laws , they at least break "apparent" laws, laws actually enacted and promulgated - i.e. "positive laws".

I do not require that the positive laws broken bear any specific relationship to the standards pursuant to which the laws are broken. A broken law may be directly contrary to the standards. Disobedience of such a law could be described as "direct". The broken law, though, may not itself be contrary to the standards, and may even be consistent with it, or promote it; such a law is disobeyed to further the other objectives of the disobedient. Civil disobedience may be direct or indirect.[360]

(B) "citizen or citizens": "Citizens" includes natural persons, corporations, and bodies politic. I include as citizens both residents or nationals and non-nationals who reside in and accept the jurisdiction of the State. Natural persons are the

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[358] "This distinction between the revolutionary and the civil disobedient, so plausible at first glance, turns out to be more difficult to sustain then the distinction between civil disobedient and criminal. The civil disobedient shares with the revolutionary the wish 'to change the world,' and the changes he wishes to accomplish can be drastic indeed--as, for instance, in the case of Gandhi.... (Did Gandhi accept the 'frame of established authority,' which was British rule of India? Did he respect the 'general legitimacy of the system of law' in the colony?)": Arendt at 77.

[359] Hart "Positivism" at 258.

[360] "Direct disobedience occurs where the law disobeyed is the very one against which the protest is being made. Indirect disobedience is the disobedience of a law other that the one which is the object of protest. Frequently it involves trespass and often it will be related to the law protested against": Mark R. MacGuigan, "Democracy and Civil Disobedience" (1971) Can. Bar Rev. 222 at 225-226; Walzer at 43.

typically disobedient - Gandhi, Martin Luther King, Joe Borowski. Corporations too may be civilly disobedient. We can imagine a corporation in South Africa breaking laws concerning the employment or residence of black workers.

Restorative civil disobedience may be performed by a single person, a group of persons, or an aggregation of persons. Arendt would require the definition to read "by a group of persons": "... the civil disobedient.., never exists as a single individual; he can function and survive only as a member of a group."[361] Arendt's group service requirement is wrong, for two reasons. First, Arendt is using the term "group" to designate not merely an aggregate or assemblage of persons; she refers to membership in a group, a consensually constituted unit. A synonym for her term "group" would be "organization". But not all cases of civil disobedience by masses of people are cases of civil disobedience by an organization. Where a people rises up against its tyrannical rulers, as in contemporary Eastern Europe, large numbers of people may be civilly disobedient. They defy the tyrant's laws. The people are not organized. They share no bond of communication, program, motive, or purpose.[362] Such uprisings, furthermore, may be spontaneous. No time may be spent forging bonds. Popular uprisings may not be of a group or of several groups, but of the people, in wild disconnection.

Second, one person may be civilly disobedient. On December 1, 1955, in Montgomery, Alabama, Rosa Parks, a lone black woman, refused a white bus driver's order to give up her seat and move to the back of a bus. Her act was not mere law-breaking even if

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[361] Arendt at 55; see 99, 101.

[362] This is evident after the revolution, when the people cannot agree on who is to do what, or on what to do next; Romania is a good modern example.

(at that time) no other black persons were civilly disobedient.[363]

I do concede that civil disobedience, as meaningful human behaviour, must, in principle, be comprehensible or communicable to other persons. This is not to say that some eccentric could not concoct some crypto-civil disobedience, intelligible only to himself or herself. But this activity would be pointless, a-human, equivalent to the sound of one hand clapping or an engine that is not linked to any operating parts. To this extent I am with Arendt: if a person is civilly disobedient, group participation in that disobedience is not precluded.

Arendt opposes solitary civil disobedience because she wishes to justify civil disobedience as voluntary association. I have argued that that justification is not acceptable. Nevertheless, civil disobedience does, in fact, frequently take the form of voluntary association. Frequently, it is highly organized activity, involving large numbers of people. Disobedience through groups may serve various functions. It shows that many people agree with the views of the disobedient. It may serve tactical functions. Mass civil disobedience is more likely to catch the attention of the people than solitary civil disobedience. Mass civil disobedience can also clog the State apparatus, imposing economic compulsion on the State to bargain with the disobedient.

Civil disobedience may be direct or indirect. The disobedient might be called "direct or indirect". When some particular group is adversely affected by some law, and that group becomes disobedient, we might call these the direct disobedient. If some sympathizers, not themselves adversely affected by the law, were to join with the disobedience of the

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[363] Her actions sparked the Montgomery bus boycott, a watershed for the black civil rights movement: Bryan Fulks, Black Struggle: The History of the Negro in America (New York: Dell Publishing Co., 1969) 268.

direct disobedient, we might call the sympathizers indirect disobedient.[364]

(C) "standards": The intentions and motivations of the civilly disobedient are key. Ordinary law-breakers serve only private interest, their own or others'.[365] The civilly disobedient serve "higher" causes. I admit that a disobedient may satisfy both private and "higher" urges. But winning private satisfactions may evidence a lack of true commitment to or motivation by "higher" causes. If the standards motivating the disobedient are manifestly non-existent, and their beliefs palpably false (e.g. the higher laws and beliefs of white supremacists), the sincerity or true commitment of the disobedient will be impugned.

Under "standards" I include positive laws, statutory or not, and human rights. A disobedient may break laws on behalf of a constitution, written (the United States) or unwritten (the United Kingdom),[366] or on behalf of human rights, neither codified nor legally recognized in a jurisdiction.

One of my differences with Rawls is that he wishes civil disobedience to be guided and justified by political principles,

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[364] An example of the indirect disobedient would be those non-native protestors who joined the Lubicon in their road blockades in North Central Alberta in 1989.

[365] The civilly disobedient are distinguished from common criminals: "There is all the difference in the world between the criminal's avoiding the public eye and the civil disobedient's taking the law into his own hands in open defiance....the common lawbreaker, even if he belongs to a criminal organization, acts for his own benefit alone....The civil disobedient, though he is usually dissenting from a majority...defies the law and the established authorities on the ground of basic dissent, and not because he as an individual wishes to make an exception for himself and to get away with it": Arendt at 75-76.

[366] In the latter case, the "higher law" is positive law through recognition by the courts.

not principles of personal morality.[367] I have tried to show that the basis of civil disobedience is moral. The morality may concern different aspects of human existence, but the judgments on which action is based are moral nonetheless. Cases of civil disobedience, particularly where the formal rules of justice have broken down, will tend to turn on political or institutional issues. But these issues are as moral as the issues on which a conscientious objector takes a stand.

While the standards appealed to by the disobedient may not be legally recognized, a condition of restorative civil disobedience is that the standards be shared by the other citizens. The standards may be recognized in a constitution, or the standards may be recognized in the shared conception of justice of the people, "the sense of justice of the majority of the community".[368] The shared standards are the target of the disobedience.

The sharing of standards is exemplified by the "willingness to accept the penalty". Some, like Arendt, deny that this is essential to civil disobedience. Others make accepting the penalty an essential part of civil disobedience; it is a means of establishing sincerity and of distinguishing civil disobedience from criminal behaviour.[369]

The problem with any requirement of accepting the penalty is the vagueness of such a requirement. The "penalty" is indeterminate. Convictions for some charges have specified penalties; other penalties fall within judicially-set ranges. Most criminal offenses have statutory ranges of fines or imprisonment or both. For many convictions, absolute or conditional discharges, or probation, are available dispositions. Theoretically, the sentence is to fit the offender. The scope

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[367] Rawls at 363, 365.

[368] Rawls at 364, 367, 382.

[369] Rawls at 367.

for argument concerning disposition is broad. The disobedient may seek light penalties to distinguish themselves from law-breakers who are not civilly disobedient. What penalty is the disobedient to accept? "Acceptance" is also indeterminate. It could mean pleading guilty, and requesting the maximum penalty; pleading guilty, and contesting the issue of sentence; pleading not guilty, and fighting the charge on the merits, particularly where the law broken is arguably unconstitutional; or pleading not guilty, and contesting both the merits and the sentence. Is a disobedient to be denied status as disobedient because he or she fights a charge? I think not. The civil disobedience is already complete by the time the disobedient is taken to Court. Furthermore, the disobedient may not accept the penalty: the disobedient may argue that any penalty forms part of the unjust law, and that unjust law, as a whole, is precisely what he or she does not accept. The disobedient may fight charges on the merits.

Common to all of these "non-acceptances" of the penalty, though, is the presence of the disobedient in court. That, in itself, does not distinguish civil disobedience from revolution. Castro was once tried by the Baptista regime; that did not make Castro only a restorative civil disobedient. Revolutionaries as well as the restorative disobedient may use the court as a forum. The difference between them is that the revolutionary regards the court only as a forum. He does not recognize its legitimacy. The restorative disobedient, who do not defy the operations of the State in their entirety, may accept the legitimacy of the Courts. The restorative disobedient would be in the position of Socrates. Socrates was prepared to break the law to live life as he saw fit. Socrates was also prepared to abide by the sentence of his court. The State was worth preserving. The disobedient appear in court and accept the verdict to show that the

disobedient do not reject the State in its entirety.[370]

This is the meaning of accepting the penalty: it demonstrates that the disobedient are not revolutionary, that they maintain some solidarity with other citizens, and that the State is worth preserving.[371]

(D) "to change the law or the policies of the State": Moral law-breaking has several species. For example, breaking the law by taking food or other property from another, without permission, may be moral.[372] Existing law may impose immoral constraints on action; some may break the law pursuing moral ends.[373] In my view, such actions are not civil disobedience. Civil disobedience has the further objective of promoting changes to the law.[374] Gandhi and Martin Luther King sought to change the law or its enforcement.

Rawls explains civil disobedience as a form of direct communication by the disobedient to other citizens. He compares

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[370] For an interesting account of a trial of both the restorative and revolutionary disobedient, see David J. Danelski, "The Chicago Conspiracy Trial" (re the trial of the Chicago 7/8) in Becker, ed. Political Trials (Bobbs-Merrill, 1971) 134ff.

[371] "One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law": Martin Luther King, Why We Can't Wait (1964) 86; see Sidney Gendin, "Governmental Tolerance of Civil Disobedience" in V. Held, K. Nielsen, and C. Parsons, edd., Philosophy and Political Action (Toronto: Oxford University Press, 1972) 160 at 161-162.

[372] See St. Thomas Aquinas, ST II-II, Q. 66, a.7, in Clark at 384, and the legend of Robin Hood.

[373] This would have been Presidents Johnson and Nixon's justification for the illegal bombing of Cambodia: they broke the law to save "their boys".

[374] Rawls at 364.

civil disobedience to a public speech.[375] The disobedient "invoke" the commonly shared conception of justice,[376] "address" the sense of justice of the majority,[377] "appeal to" the fundamental political principles of a democratic regime,[378] "declare" that in the considered opinion of the disobedient, the principles of social cooperation are not being respected,[379] each disobedient "presents his case."[380] But if words work, why be civilly disobedient? Rawls does not sufficiently distinguish civil disobedience from legal unofficial procedures for addressing State error.

The unofficial legal procedures and civil disobedience differ in two ways. First, for the general public, civil disobedience will appear, prima facie, immoral: "Everyone else abides by the law, why should these people think they're special?"[381] Organized law-breaking is shocking, an affront to the community. It is a repudiation of consent to the State. It evidences a serious fracture of the political community. Rawls does not appreciate the seriousness, the affront of civil disobedience; for him, it is something which we should get our fair turn to try. The prima facie immorality is the great danger of civil disobedience. The public may maintain its belief that the disobedient are immoral fanatics who ought to be locked up.

Second, the civilly disobedient do not assume that the public is ready to act as a debating partner. Rawls refers to

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[375] Rawls at 366.

[376] Rawls at 365.

[377] Rawls at 366.

[378] Rawls at 386.

[379] Rawls at 364.

[380] Rawls at 365.

[381] see Tucker at 220.

the "immovability" or "apathy" of the majority.[382] This bespeaks a deeper problem. The majority does not act, because it does not believe that it ought to. The majority cannot be spoken to, because it has forgotten or ignores its moral and political principles. The affront of civil disobedience is to shock the majority into thinking once again.

The operation of restorative civil disobedience is dialectical. Civil disobedience seeks to elicit the recognition of true moral principles, the moral principles espoused by the disobedient, and the retraction by the public of their consent to immoral laws or State actions. Civil disobedience attempts to obtain this response by provoking the hate of the community for the disobedient. Through the adverse response to the disobedience, a response favourable to the disobedient is to emerge. Civil disobedience accomplishes the transformation not directly (as in speeches and pamphlets) but indirectly, by creating moral dissonance. That is, to transform society, civil disobedience must provide the spectacle of good people breaking a purportedly good (because existing) law. To resolve the tension between the good disobedient and the good law, one or the other must be reevaluated to be bad. If the disobedient are perceived to be bad, no dissonance arises. Bad people break laws all the time, for no salutary purposes. If the disobedient are good, the inference is suggested that breaking the law is good; this could not be so unless the law broken were bad or were connected to a bad law. If the law is judged to be bad, then the law should be repealed or amended to become good.

If restorative civil disobedience does not operate dialectically, if other citizens are readily convinced of the position of the disobedient, then the disobedient should not be resorting to disobedience; they should be using legal procedures to correct the error--unless legal procedures are not available

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[382] Rawls at 373.

to them.

In the context of the dialectical operation of restorative civil disobedience, the publicity and non-violence of civil disobedience must be considered.

Rawls[383] and Arendt[384] require civil disobedience to be public. This is correct. If civil disobedience is to awaken the majority, the majority must find out about the disobedience. If the disobedient do not act in public, their secrecy may suggest that the disobedient are truly criminals, who want to "get away with it"; or are revolutionaries, who do not wish to remind the public of anything, but wish to overthrow the State.

Civil disobedience need not be non-violent.[385] I can imagine violent behaviour which I would nevertheless classify as civil disobedience. Suppose you are "sitting in" in the reception area of a big polluter's offices. Security guards enter, carrying clubs. The guards begin to beat the protestors. You and the other protestors fight back. Does your civil disobedience end when you hit back? Why? The big polluter's privacy remains attacked. You and your comrades remain trespassers. You may or may not have broken other laws by resisting the guards. You remain civilly disobedient. Non-violence is not a necessary condition of civil disobedience. Alternatively, an act of civil disobedience may be directly violent. Citizens may trash the offices of the secret police. Father Daniel Berrigan and some cohorts were recently convicted for bashing some missiles with a hammer. Violent action may, in the proper circumstances, be an attempt to remind the public of its moral foundations.

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[383] Rawls at 364, 366.

[384] Arendt at 75.

[385] contra: "...the use of exclusively non-violent means is of the essence of civil disobedience": MacGuigan, "Democracy and Civil Disobedience" at 324.

The disobedient, however, seek to create dissonance. No dissonance will occur if the disobedient are regarded as bad or as mere criminals. The disobedient must present themselves as good people. Good people, typically, are not violent. For civil disobedience to be effective, generally it must be non-violent. To further this impression of goodness, the civilly disobedient will be willing to "accept the penalty". Good people accept verdicts of the Court. Good people are also willing to suffer for their convictions.

If the disobedient are violent, clandestine, and avoiders of the police, the inference may be drawn that the disobedient are not truly disobedient, but hoods.

(b) justification

To consider the morality of restorative civil disobedience, I will assume that the disobedient are combatting immorality, that the intentions of the disobedient are moral, and that the official and unofficial procedures for correcting State error have been found to be ineffective.

Restorative civil disobedience will not be moral unless it overcomes the prima facie duty to obey the law. The disobedience must cause less harm to the common good than the State immorality.

Civil disobedience in the service of combatting unequal treatment creates a greater threat to the common good than conscientious objection. The number of laws or executive actions which may be perceived to be unfair is greater than the number of direct State compulsions. The foundation of the disobedience in the unfairness of treatment does restrict the availability of this disobedience, however. Inequality of treatment is a relatively limited political claim. Civil disobedience in the service of combatting immoral State policies poses yet a greater threat to the public good. Many State actions or decisions could

be challenged. This form of restorative civil disobedience imposes no inherent limitations on the types of persons who may wield it. Goodman's observation, quoted above, reminds us that even civil disobedience concerning substantive State error need not, on the facts, pose a sufficiently grave threat to the State to forbid all such civil disobedience.

Restorative civil disobedience runs the risk of being coercive, even if the disobedience is non-violent.[386] Nonviolence may be but an "equivocal form of the language of power", a different method to express the will to power. It may be a veiled form of psychological aggression.[387]

Non-violent civil disobedience may become coercive in three ways. First, it may become coercive when it monopolizes or seriously disrupts the possibility of political debate. Political debate, conducted through official and unofficial procedures, and governed by more or less formal rules of order, should permit intelligent and profitable discussion.[388] Free access to and use of these procedures promotes persons' social existence. Civil disobedience breaks these rules. It is an attempt to make political communications outside of authorized channels. It is a claim to the power to make these unauthorized

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[386] Orwell makes this point: "There are families in which the father will say to his child, 'You'll get a thick ear if you do that again', while the mother, her eyes brimming with tears, will take the child in her arms and murmur lovingly, 'Now darling, is it kind to Mummy to do that?' And who would maintain that the second method is less tyrannous than the first? The distinction that really matters is not between violence and non-violence, but between having and not having the appetite for power": George Orwell, "Lear, Tolstoy and the Fool" in Inside the Whale and Other Essays (Harmondsworth, England: Penguin Books Ltd., 1969) 101 at 118.

[387] Thomas Merton, "Peace and Protest" 67 at 75, and "Faith and Violence" 185 at 192 in The Nonviolent Alternative; Walzer at 25, 44.

[388] Rawls at 203.

communications. Second, non-violent civil disobedience may become coercive by obstructing social interchange. If the disobedient clog the justice system, or obstruct the ordinary workings of society, the disobedient may force the public to accede to the demands of the disobedient, as much as if the disobedient threatened violence. Hence, civil disobedience will be coercive if the disobedient have adequate access to the means of political discussion, or if the disobedience disrupts social existence.

The third way in which non-violent civil disobedience may become coercive is where it provokes, and is intended to provoke, violence.[389] Violence may be sought to dramatize the plight of the disobedient, or to demonstrate the alleged true character of the State.[390] The violence of the State may be an awaited "provocation" which is to justify the use of violence by the disobedient. In the terms of my interpretation, non-violence that seeks violence appeals to and promotes the pale criminal in others.

Civil disobedience arising from unequal treatment will be less likely to be coercive. If a group has been excluded from the official and unofficial procedures, or if its participation has been restricted, the claim to power is a claim to what rightfully should be permitted to the disobedient. If a group is discriminated against, it may only be taking steps to protect itself.

Civil disobedience arising from concern with immoral State policies is more likely to be coercive. So long as the State is reasonably moral, dissenters should not disrupt State processes by claiming communicative powers not available to others. Such disobedient will not be responding to discriminatory treatment by

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[389] Walzer at 25; Merton, "Blessed Are the Meek" in The Nonviolent Alternative 208.

[390] as an organ of violence: Lenin, The State and Revolution in The Essential Left (London: Unwin Books, 1971) 147 at 220.

the majority.

The disobedient may mitigate the stresses they impose on the State by accepting penalties, adhering to non-violence, and limiting the scope of their disobedience so that it does not become coercive.

Restorative civil disobedience may be conducted in a way that does not transgress against pluralism. Since restorative civil disobedience is a form of expression of a position, albeit a dialectical expression, disobedience may enhance, rather than reduce pluralism. Civil disobedience arising out of unequal treatment can enhance pluralism. Citizens treated unequally may have been denied a voice in the public forum. Civil disobedience gives them a voice. Civil disobedience concerning immoral State policies does not have so great a likelihood of enhancing pluralism. If the disobedient, like other citizens, have had a chance to speak on an issue, the use of civil disobedience tends to be, as indicated, coercive. If the disobedient are coercive, they force their views on others, and prevent others from having an equal or effective voice. Insofar as the disobedient do not attempt to equalize their voice with the voice of others, but attempt to dominate others, their civil disobedience tends to reduce pluralism, and is, to that extent, immoral.

Restorative civil disobedience may satisfy the other criteria of moral illegal responses to immorality.

Restorative civil disobedience may be directed at the source of the immorality, the State. This is true both of civil disobedience arising from unequal treatment and civil disobedience concerning immoral State policies. Non-violent civil disobedience permits direct action against the State, the opponent of maltreated citizens. The disobedient may have no quarrel, for example, with individual police officers. Their quarrel would be with the roles these individuals play in enforcing immoral laws. Such disobedient quarrel with institutions, rather than individuals. Violence directed at

office-holders would directly interfere with the office-holders as individuals. A police officer may arrest a non-violent disobedient, but that is part of his job, and the physical effort required to arrest a disobedient does not impair the officer's existence. If the police officer is hit with a brick, his individual existence may be irreparably damaged.

Circumstances, regrettably, may justify violence. If individual office-holders abuse or attack the disobedient, legally or not, the individual office-holders, and not merely their offices, become the opponent of the disobedient, the disobedient should be entitled to defend themselves like other persons. Furthermore, in urgent circumstances, where the immorality opposed is great, violence may be a moral response.

Restorative civil disobedience may be appropriate in the time constraints. Civil disobedience is a tactic of the impatient. Thoreau writes that the State's ways "take too much time, and a man's life will be gone."[391] Goodman reports that the young disobedient

> use language that is openly revolutionary and apocalyptic, as if in their generation they were going to make a French Revolution.[392]

Hampshire describes this lack of patience:

> there is probably a deeper difference between contemporary radicals and their older liberal critics....It concerns the imagined time scale against which the effects of policies are calculated. A classical liberal...looks at contemporary institutions and habits of thought as persisting through vicissitudes in successive generations and sees the lives of only one generation, including his own life, as a phase or incident of a long process, in which some of the past is transmitted to his descendants and some is replaced in his own time.

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[391] Thoreau at 232.

[392] Goodman at 2.

> ...in the over developed countries, in the United States, the Soviet Union and its satellites, and in Western Europe, it is not unreasonable to measure one's activities while still young against a shorter time span and to reject the seemingly perpetual mobilization which the politics of confrontation requires.[393]

Impatience may not be justified. Where immoral State policies are in issue, the likelihood is greater that impatience is improper, and cautious analysis is required. Even in cases of unequal treatment, the question of the propriety of the unequal treatment may require long cautious thought. Rawls notes that issues respecting economic and social institutions and policies may support a wide range of conflicting but rational opinions.[394] Such issues require patient analysis, not quick action. Policies that have been adopted by the State should be permitted to run their course, to determine whether the policies are or are not proper.

Civil disobedience must be proportional to the immorality opposed. Where the immorality is slight, limited acts of disobedience may be appropriate. Where the immorality is great, organized campaigns of wide-spread disobedience may be appropriate.

Restorative civil disobedience tends to be ineffective. Restorative civil disobedience not only seeks to change the law, but permits the disobedient to express themselves (dialectically). The danger is that all persons and groups will want to express themselves in the fashion of the disobedient. Rawls must sense this tendency, since he does describe the scheduling of civil disobedience. The disobedience itself may be effective: since the disobedience is directed to the moral

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[393] Stuart Hampshire, "Russell, Radicalism, and Reason" in Held, Nielsen, and Parsons edd. 258 at 271, 273.

[394] Rawls at 372. I noted above that Alinsky cautions young radicals to be patient: Alinsky at xx.

consensus, if that consensus is engaged, the results of the disobedience ought to be as firm as the moral consensus. The disobedience, however, creates a generalizable precedent which, when resorted to by competitors of the disobedient, will function to disrupt the well-ordered society sought by the disobedient.

6.3-revolutionary civil disobedience

The breakdown confronted by citizens may not be of the first or second types identified above. The breakdown may be a breakdown in the moral consensus, where citizens have ceased to agree in their moral judgments.

The restorative civilly disobedient assume that other citizens share relevant convictions with the disobedient, and that other citizens and those who operate the State are rational. Where those assumptions no longer hold, restorative civil disobedience is impossible. Rawls says that the basis for civil disobedience is eliminated.[395] In the circumstances of the breakdown of the moral consensus,[396] restorative civil disobedience is not possible.

When a breakdown in the moral consensus occurs, the tolerance of dissenters is tested. This tolerance is not tolerance of the State alone, but tolerance of others. To what extent can pluralism be lived? Most persons, appreciating their limitations, accept that a diversity of views leads to personal and social development. No one of us has all of the answers;

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[395] Rawls at 388. Rawls asserts this because of the theoretical limitations of his account of civil disobedience. He can only resort to the moral consensus, interpreted as a political consensus. Beyond that, no appeal lies. Beyond that is only sectarian fanaticism.

[396] if the breakdown is corrigible, in the sense that judgments may be corrected by an appeal to some publicly recognized moral standards, a true breakdown in the moral consensus has not occurred.

together we can go some distance toward the truth. Deep moral issues, more than any other issues, will engender a variety of opinions, opinions which each should hear. Moral diversity ought to be tolerated.

Persons may consider some issues to be too important to be left to debate. Tolerance, they say, has its limits. When views and actions based on those views stray beyond those limits, those who dissent are compelled to act.

They may have recourse to the official and unofficial procedures. These will not give satisfactory results, since in the opinion of the dissenters, the issues ought not to be open to debate at all. Furthermore, the dissenters deny that their opponents are fully rational, at least fully morally rational. Because of the divergence in judgments, the dissenters and their opponents cannot use arguments with one another (each appearing to the other to be the barbarian). The boundaries of argument have been reached.

What then can the dissenters do?

When words fail, actions remain. Dissenters may feel as if they are caught in a back alley brawl. If your opponent has a knife, and will not listen to reason, you must do what is necessary to survive. Where the opponents of dissenters threaten violence to the dissenters, the dissenters will be inclined to use violence to block the violence. Armed insurrection and civil war may be justifiable on the criteria I have provided:[397] if official and unofficial procedures for correcting error are ineffective, violence could be directed at the source of the threatened violence, violence could be limited to combatants, violence could be appropriate in the relevant time frames, violence could be proportional to the violence threatened, and violence could be an effective means of blocking the threatened

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[397] see Merton, Peace and Protest" at 67; "Faith and Violence" at 187; "The Machine Gun in the Fallout Shelter" in The Nonviolent Alternative 103 at 104.

violence.

Where the danger posed by other citizens is not sufficiently extreme to warrant violence, the principle still obtains: When words fail, actions remain.

At this point, two species of civil disobedience emerge, both of the genus revolutionary civil disobedience.

(a) definition

The basic similarity of the two species and their basic distinction from restorative civil disobedience is their deep opposition to the social order. The revolutionary disobedient will not accept the State generally, and do not challenge only specific actions or laws. The revolutionary disobedient oppose structures of evil in the State.

The species differ in their interpretations of the human condition. One species, dominative civil disobedience, discerns no unity of moral response beyond the moral consensus. When the moral consensus is fractured, no further moral reconciliation is possible. Dominative civil disobedience is strategic action aimed at effecting legal or State change by reminding citizens of their allegiances, converting citizens, or coercing the unconverted. Dominative civil disobedience is not concerned with the types of disobedience tactics it uses, save that the tactics must be effective.

The other species, unitive civil disobedience, turns to the human form of life. It interprets persons, beneath all of their social and cultural diversity, to have certain natural moral responses. Civil disobedience is to engage this natural moral response, win it from under a cover of words and hostility. This strategy requires moral sensitivity in the selection of disobedience tactics.

The relationships between restorative, dominative, and unitive civil disobedience are as follows:

Revolutionary civil disobedience, like restorative civil disobedience, involves public breaches of particular positive laws by a citizen or citizens of a State following some standards judged to be superior to or to permit the breaking of the laws broken, to effect legal or State change.

(A) Restorative disobedience is an indirect form of communication. The disobedient have something to say, and breaking the law is a medium of communication. The dominative disobedient, who deny the possibility of communication with at least some of their opponents, see civil disobedience as a tactic, to be used when efficacious. The unitive disobedient, like the dominative disobedient, also confront the failure of communication with opponents.[398] The restorative and the dominative disobedient perceive no moral activity beneath the moral consensus; the unitive disobedient attempt to use action as their medium. Action is not to be understood as being without meaning, as purely physical. It is meaningful, the source of language. Because of the hiddenness of action in our ordinary lives, the disobedient cannot be sure that they sense properly or truly the basic human responses. Hence, by action, the unitive disobedient send no one message: they indicate disapproval of the law and State, yet an acceptance of their own lack of an indubitable foundation for their position; they express firmly their convictions, yet manifest an openness to moral dialogue with their opponents; they call for change, yet do not seek quick success; they express division over issues, yet seek also to express human unity.[399]

(B) The revolutionary disobedient will oppose the law, the penalty, the whole State system. The dominative disobedient see

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[398] Merton, "Peace and Revolution" at 70; "A Tribute to Gandhi" in The Nonviolent Alternative 178 at 182.

[399] Merton, "Peace and Protest" at 75; "Tribute to Gandhi" 181, 182; "Blessed are the Meek" at 209; "Note for Ave Maria" in The Nonviolent Alternative 231 at 233.

no virtue in supporting State functions by taking the punishment meted out by the State. The dominative disobedient may resist arrest, or go underground. They become, in their own way, outlaws. Alternatively, the dominative disobedient may accept the penalty, not to endorse aspects of the State, but to clog the correctional facilities of the State, not as a negotiating ploy, but as a means of paralysing and killing the State.

The unitive disobedient will not approve of the State any more than the dominative disobedient. Nevertheless, the unitive disobedient will accept the penalty. The unitive disobedient do not endorse the State. Rather, like the restorative disobedient, they seek to promote the dialectical realization of goodness--but not of the disobedient, but of their cause. The unitive disobedient want to encourage a natural response to the relevant issue. By accepting the penalty, by appearing non-threatening, they hope to discourage excessive negative emotional and intellectual responses to their activity. By accepting the penalty, they hope to show that the truth, not personal interest, is paramount.[400] By accepting the penalty, they also hope to show that they trust the State and other citizens.[401]

(C) Restorative and dominative disobedience share a commitment to results. The restorative disobedient want to say their piece, and to convince others to support legal or State change. The restorative disobedient rely on the moral consensus. For both species of revolutionary disobedience, no assumption is made that citizens share the convictions of the disobedient. For the revolutionary disobedient, other citizens fall into three groups--those who do share the convictions of the disobedient, those who will share the convictions of the disobedient, and those who will not share the convictions of the disobedient.

Dominative disobedience is not entirely a direct or indirect

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[400] see Merton, "Peace and Protest" at 68.

[401] Merton, "Blessed are the Meek" at 215, 216.

appeal to shared convictions. The dominative disobedient will appeal, directly or indirectly (dialectically) to those who share the convictions of the disobedient. The sleepers must be awakened; civil disobedience may be the shock that reminds other citizens of what they believe. The revolutionary disobedient will seek to convert those who do not share the convictions of the disobedient. Disobedience takes the form of "witnessing" to convictions. By their fortitude, their willingness to risk much for their cause, the disobedient attempt to change the minds of those who oppose them. Non-violence can be used in this context, in the same way as in restorative civil disobedience.

If some citizens do not and will not agree with the dominative disobedient, the disobedient will worry no more about their minds, but will attempt to suppress them. This need not be done with force. The disobedient may smother the State and others with non-violent action, and coerce others into obeying them, just as if the disobedient used guns.

The unitive disobedient will not attempt to coerce others. Because of their belief in the underlying unity of persons--even disagreeing persons--they will direct their efforts to exposing that unity. The unitive disobedient will not attempt to achieve their ends rapidly; that would result in an imposition of their views on others, not the emergence of consensus.

(b) justification

Revolutionary activity risks much. The revolutionary disobedient will have to meet a high standard of moral proof to overcome the prima facie duty to obey the law.

The revolutionary disobedient must take extra care to ensure that they have correctly judged their opponents' immorality, and their own morality. The language of revolution is grand; the passions are high. The revolutionary ideology gives a firm stand from which to judge good and evil. The spirit of revolution

gives power; a revolutionary feels solidarity with his comrades, he is charged with their energy as he mounts the barricades. All of this, however, may mask errors in judgment. Caught in the wave of revolution, a revolutionary may pay insufficient attention to the propriety of his or her moral judgments. The revolutionary disobedient must carefully judge themselves, to ensure that they have not been caught in their own rhetoric, that they have not ceased to judge others' views with becoming charity, or, worst of all, that they have ceased to see the world as it is, but only as they wish it to be.[402]

Even immoral States may have the virtue of providing stability to social interaction. Such States may be effective, if not moral, conflict resolvers. The disobedient must have a plan for the form of organization that they will substitute, an organization which will promote the common good in a manner superior to the former State. Conservatives caution dissenters to be aware of human limitation. States may be concretizations of decades or centuries or millennia of political labours; dissenters ought not to be quick to replace the State. What the State is replaced with may prove worse than the State that was.[403]

Dominative disobedience is a threat to the State. Indeed, the dominative disobedient seek to destroy and replace the State.

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[402] "By revolutionary phrase-making we mean the repetition of revolutionary slogans irrespective of objective circumstances at a given turn in events, in the given state of affairs obtaining at the time. The slogans are superb, alluring, intoxicating, but there are no grounds for them; such is the nature of the revolutionary phrase": Lenin, in Lenin on Petty-Bourgeois Revolutionism (Moscow: Novosti Press Agency Publishing House, 1974) 23.

[403] Burke writes that "We tolerate even these; not from love of them, but for fear of worse": Burke at 273. Burke opposes the "upstart insolence" of the "spirit of innovation": Burke at 121, 119. He describes reform as "generally pernicious": Burke at 271. For Burke, as for other conservatives, all change is not forbidden. Change is accomplished by the "method of nature", the "natural course of things": Burke at 120, 271.

If one group of dissenters may disobey to further its ends, any group of dissenters may disobey. Unitive disobedience is not so generalizable. It requires severe discipline, and a commitment to truth, rather than power. It cannot readily be employed by the politically active, who will fail to meet its qualifications. The danger of unitive disobedience is that the disobedient may use its language, while behaving coercively: actions, though, will speak louder than words. If persons are behaving coercively, they will not be engaged in unitive disobedience.

The main danger of revolutionary disobedience, violent or not, whether dominative or unitive, is that the disobedience may be coercive, and harmful to at least some substantial number of persons. Revolutionary disobedience may impair pluralism; persons may suffer as a result.

Dominative disobedience is frankly coercive. To the extent that the opponents of the dominative disobedient are not behaving immorally, dominative disobedience, by its coercion, will be immoral.

Unitive disobedience should not be coercive. The unitive disobedient must therefore be scrupulous in their selection of tactics.

What tactics are available? Sit ins, marches, vigils, rent strikes, job blockades, disruptions of governmental services, disruptions of transportation or commerce, picketing, fasts, immobilizations of the disobedient come to mind.[404] In addition to tactics themselves, the disobedient may respond to interventions by the authorities in a programmed manner. The disobedient may go limp, not struggling, but requiring two to

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[404] Fulks at 270, 278; MacGuigan, "Democracy and Civil Disobedience" at 247, 253, 254. By immobilization, I refer to the disobedient chaining or (in the case of Australian environmental activists) cementing themselves in obstructive locations. The freedom rides and boycotts of the Black civil rights movement were not civil disobedience, but exercises of legal rights in the face of illegal opposition.

four police officers to carry each disobedient to the holding van.

Any of these tactics may be coercive. Walzer notes that even fairly innocuous tactics like sit ins may be coercive.[405] The tactics may be coercive if the tactics monopolize or seriously disrupt the possibility of political debate, if the tactics obstruct social interchange, or if the tactics encourage violent responses. To avoid coercion, unitive disobedience tactics should be limited in three ways. First, the tactics should be kept on a small scale. Even if the tactics interfere with others in a minor way, the interference can be kept negligible and political communication by all may continue. Second, other citizens should not be directly blocked. The intention of unitive disobedience is not to compel moral compliance physically, but to win the moral response from opponents. If the immorality of opponents requires direct blocking, non-violent resistance has become irrelevant. The disobedient need not ignore their opponents' activities. While not blocking them, the disobedient may station themselves near their opponents and their activities. Third, the unitive disobedient should not incite violence. The disobedient must not be arrogant, abrasive, smug, or condescending. The limp response and immobilization must not be used. The limp response is less coercive; but neither response is non-resistance--both are passive resistance. These two tactics are contrary to the ideals of unitive disobedience. The tactics bespeak single-mindedness, an unwillingness to negotiate or enter into dialogue; the fracture of community, and not the unity of persons. I agree with Walzer's comment that the limp response is humiliating, an abasement of personhood.[406] The unitive disobedient should behave with honour and dignity. If they are arrested, they should walk,

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[405] Walzer at 44.

[406] Walzer at 40-41.

unresistant but with courage, to their cells. The message of the unitive disobedient should be the message of calm, rational adults.

Revolutionary civil disobedience encounters further difficulties with the other criteria of moral law-breaking.

Revolutionary civil disobedience arises from a breakdown in the moral consensus. Prima facie, the source of the immorality is other citizens, rather than the State. Prima facie, the State is not the appropriate target of a moral response to immorality. For revolutionary civil disobedience to be morally directed at the State, the disobedient must make a further finding. The State must be the tool of the opponents of the disobedient. The State must be an instrument of the immorality of the opponents of the disobedient. Where the State and the opponents of the disobedient are one, moral action may be directed at the State; if the State is independent of the opponents of the disobedient, the State should not be the target of the response of the disobedient to their opponents' immorality.

One might argue that the State is never independent: Legislators may legislate concerning any aspect of social life; the refusal to legislate concerning some matter is as much a legislative choice as the choice to legislate; if legislation is not created to provide a State-sanctioned resolution of a moral breakdown, the State is, through its silence, by permitting some conduct to continue, manifesting its approval of and complicity with that conduct. The State, then, may be the silent instrument of opponents, and an appropriate target of a moral response.

In some cases, silence may be consent, tacit approval. In such cases, a silent State may be a proper target. But in some other cases, silence may not indicate either approval or disapproval. For example, a corporate officer may be questioned in an examination for discovery concerning remarks made by an employee. The officer may respond by confirming that the employee made the remarks, but that the corporation neither

affirms nor denies the remarks. Politicians and diplomats frequently respond to questions with the phrase, "No comment". This response, at least in some contexts, should indicate neither a positive nor a negative response. A person faced with a choice may not know which course to take. His or her failure to act may indicate not approval of the events in which he or she does not interfere, but a genuine uncertainty about whether he or she should act, or how he or she should act. Finally, we are aware of situations where someone will permit others to act--a parent his or her child, for example. In some cases, we would not say that the "empowerer" caused or is responsible for the acts of the other.

Thus, whether a silent State is a complicitous State depends on whether the State is silent in approval, is silent in reserved judgment, is silent in decision, or is silent in non-interference.

The impatience of the disobedient may or may not be justified. Deep moral issues may take centuries to work out. Dissenters should not expect to transform society radically after a couple of meetings and marches. On the other hand, the disobedient may take the position that time has worked out the solutions to the deep moral problems, and that the disobedient are poised to execute the judgment of history. The disobedient may also take the position that if they do not act, great immorality may occur. They cannot stand idly by and watch death, destruction, the waste of lives. The disobedient may point out that if they permit time to elapse, the immoralities may become more and more deeply entrenched, more difficult to eliminate. The revolutionary disobedient may be able to claim, all other matters aside, that time is on their side. The unitive disobedient, who are not concerned with immediate results, cannot, in any event, be accused of impatience.

If the revolutionary disobedient can make a compelling case that substantial immorality springs from other citizens and their

puppet State, the magnitude of the immorality combatted may support the drastic action of attempting to destroy the State through civil disobedience. To the extent that the magnitude of the evil combatted diminishes, the justifiability of the resort to civil disobedience on this ground diminishes.

Dominative civil disobedience is inherently ineffective. A victory by force invites a counterattack by force--whether the cause is good or not. A result that is imposed, unless the defeated are converted, must be maintained with force. The results of successful dominative civil disobedience are only as secure as the weakest elements maintaining the results. The dominative disobedient stand in the position of Plato's tyrant.

Because unitive civil disobedience is not, essentially, too effective a tactic, it is not too ineffective a tactic. That is: unitive civil disobedience is a means of rational persuasion. It does not impose a result. The great weakness of this form of civil disobedience is that no one will pay attention or be swayed. Yet this is also its strength. If this form of civil disobedience leads to a desired result, that result has the sureness of a humanly-founded rational conclusion. Even if others resort to civil disobedience to combat the result, if they are not as true to the human condition as the prior disobedient, the victory will not be snatched away by the newly disobedient. Since not force but truth is the standard, the results of unitive civil disobedience may be long lasting. To this extent, unitive civil disobedience is effective.

In this Chapter, I have identified the genuses of civil disobedience, and their modes of moral justification. What remains for the following Chapter is to fix the classification of pro-life activism and to determine its moral justifiability.

CHAPTER 7: PRO-LIFE CIVIL DISOBEDIENCE

I have determined that moral evaluation is possible, and that civil disobedience may be morally evaluated. I have provided an interpretation of morality, against which civil disobedience may be judged. I have provided an account of rights, which the disobedient may assert and the State should protect. I have identified the *prima facie* obligation to obey the law. I have identified the types of breakdowns which may occur, and which may impel citizens toward civil disobedience. I have discussed the conditions and criteria for moral law-breaking in the service of correcting breakdowns. I have identified three forms of law-breaking in the service of combatting breakdowns, and have discussed their moral justifications. With all of this in hand, in this Chapter, I turn to the moral evaluation of the civil disobedience of pro-life activists. I identify their civil disobedience as a form of dominative revolutionary disobedience, which, in the circumstances, is not morally justified.

7.1-the breakdown

Pro-life proponents may become conscientious objectors. Police officers have refused to guard abortion clinics. Nurses have refused to participate in abortion procedures. For the most part, though, the State (or the private sector) does not compel pro-life proponents to behave immorally. The larger province of pro-life illegal behaviour will not be that of conscientious objection, but civil disobedience.

From what sort of breakdown arise the issues contested by pro-life activists? Do the issues arise from unequal State treatment or immoral State policies, or do the issues arise from the breakdown of the moral consensus?

The breakdown may appear to be one of State policy. Pro-life activists could point to allegedly immoral State actions,

such as funding for or licensing of abortion clinics, or the failure of the State to circumscribe the activities of abortion clinics by legislation. State action, though, is not the source of the pro-life issues, in the way that an unjust war would be source of issues combatted by the restorative disobedient. The State is not the moral source of its abortion policies; it responds to pressures from its constituents. State action on abortion is symptomatic only.[407]

The breakdown is either a breakdown of equal State treatment or a breakdown of the moral consensus.

Pro-life activists assert that the breakdown is that of equal State treatment, not one of the moral consensus. They say that they are fighting for equal rights in the manner of the Black Civil Rights movement.[408] The claim is that the State behaves unjustly toward the unborn. The unborn are denied their rights to be treated equally with other persons. Pro-life activists may also compare their struggle with the struggle of Blacks to recognized as human and to eliminate the curse of slavery. This struggle appears to be closer to the pro-life struggle than the civil rights struggle. The abolitionist struggle turned on the recognition of entities as human, as does the pro-life struggle. The abolitionist struggle appears to be an equal rights struggle; why is the pro-life struggle not a struggle for the equal rights of the unborn?

I submit that the analogy to the abolitionist struggle does not assist the characterization of the pro-life issue as an equal rights issue. Neither the abolitionist struggle nor the pro-life struggle are, at root, struggles over equal rights.

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[407] I have complained elsewhere that while the legal aspects of the pro-life issue can and should be pursued, the legal aspects are largely secondary; the legal aspects are not the essence of the issue.

[408] This analogy was expressed by Dr. Bernard Nathanson and other speakers at a rally at the University of Alberta in April of 1989.

The battle against slavery does take the form, with some writers, of a pure human rights or equal rights struggle. Garrison sees the cause as "the great cause of human rights" and cites in support the Declaration of Independence, "that all men are created equal...." Therefore he contends for "the immediate enfranchisement of our slave population."[409] Weld writes: "The case of Human Rights against Slavery has been adjudicated in the court of conscience times innumerable. The same verdict has always been rendered--'guilty;' the same sentence has always been rendered--'Let it be accursed'...."[410] In their attack on slavery, the "Independent Democrats"

> entreat you to be mindful of that fundamental maxim of Democracy--EQUAL RIGHTS AND EXACT JUSTICE FOR ALL MEN. Do not submit to become agents in extending legalized oppression and systematized injustice over a vast territory exempt from these terrible evils.[411]

The abolitionist and pro-life issues may be fought in the Courts, like equal rights issues, with reference to fundamental rights and freedoms.

The abolitionist and pro-life struggles are distinguished from equal rights struggles for three reasons. First, the issues do not concern members of the body politic, whose consent to governance has been abused; the issues concern persons who have not been admitted to the body politic, and whose admission is sought. Second, the misconduct barring the persons from the body politic is not, directly, State misconduct. Thus, in the abolitionist case, Lincoln does not perceive the U. S. Constitution as the cause of or as absolutely supporting slavery:

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[409] William Lloyd Garrison, The Liberator (Jan. 1, 1831) in Hofstadter at 321, 322.

[410] Theodore Dwight Weld, Slavery as it is (1839) in Hofstadter at 324.

[411] "Appeal of the Independent Democrats" (S.P. Chase, Charles Sumner, J. R. Giddings, Edward Wade, Gerritt Smith, Alexander De Witt) (1854) in Hofstadter at 358.

> It is not true that our fathers, as Judge Douglas assumes, made this government part slave and part free....He assumes that slavery is a rightful thing within itself,--was introduced by the framers of the Constitution. The exact truth is, that they found the institution existing among us, and they left it as they found it.[412]

Similarly, the Charter has nothing explicit to say about abortion or the rights of the unborn. Not the State, but other citizens are in error: "One section of our country believes slavery is a right and ought to be extended, while the other believes it is wrong and ought not to be extended."[413] Third, to preserve the body politic, the issues may be compromised in a way that equal rights issues cannot. The form of an equal rights issue is "Citizens have certain rights; X is a citizen; therefore X has certain rights." Either the person has the rights or he or she does not.[414] Lincoln does not approach the issue of slavery in this manner: "...[Judge Douglas] assumes that I am in favour of introducing a perfect social and political equality between the white and black races....There is no foundation in truth for the charge that I maintain [this proposition]."[415] Lincoln responds to the radical abolitionist Horace Greeley as follows:

> If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount

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[412] "The Lincoln-Douglas Debates" (Lincoln's Reply, Alton, Oct. 15, 1858) in Hofstadter at 377.

[413] Lincoln, "First Inaugural Address" (1861) in Hofstadter at 394.

[414] in Canada, subject to such limitations as are demonstrably justifiable in a free and democratic society: section 1 of the Charter. If compromise were acceptable, the struggle for equal rights might be useless, and civil disobedience an irrelevant tactic.

[415] "Lincoln-Douglas Debates" in Hofstadter at 379.

> object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could do it by freeing some and leaving others alone, I would also do that.[416]

Similarly, Parliament has sought to resolve the pro-life issue by compromise. Even the Canadian Conference of Catholic Bishops has sought compromise, to the dismay of the radical laity.[417]

Both the abolitionist and pro-life issues are more than equal rights issues. The issues arise from citizens' fundamentally divergent responses to the world and to others. A fissure has opened in the body politic:

> Evidently, we have here a paradigm of what Wittgenstein had in mind when he spoke of the possibility of two people agreeing on the application of a rule for a long period, and then, suddenly and quite inexplicably, diverging in what whey call going on in the same way. This possibility led him to insist that linguistic communication presupposes not only agreement in definitions, but also agreement in judgments, in what he called forms of life--something that seems lacking in the case at hand.[418]

Pro-life and pro-choice proponents respond differently to the unborn human. They do not agree in their judgments. The moral consensus has broken down.

7.2-legal procedures

The divergence in judgments which stimulates pro-life

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[416] Response to Horace Greeley (1862) in Hofstadter at 411.

[417] the C.C.B. sought compromise because without it, it sees no hope of any abortion law. The C.C.B. is willing to accept the lesser of two evils.

[418] Roger Wertheimer, "Understanding the Abortion Argument" in J. Feinberg, ed. The Problem of Abortion (Belmont, California: Wadsworth Publishing Co., 1973) 33 at 46.

activists could be tolerable, within the scope of pluralism. The pro-life activist position is that the divergence of the pro-choice judgments exceeds tolerability; pluralism cannot be extended so far. Pro-choice proponents choose what the pro-life activists judge to be immoral. That is the activists' call to action. They wish to respond to what they perceive as great and manifest pro-choice immorality.

What can pro-life activists do?

Pro-life activists have had recourse to official and unofficial procedures. Are these ineffective?

Dr. Nathanson and his followers deny that the official and unofficial procedures are effective: Pro-life activists have taken their message to the Courts, Parliament, and the streets. The State has not responded. Laws have not been enacted in the forms desired by Dr. Nathanson and his followers. Since, in Dr. Nathanson's mind, the official and unofficial procedures are not effective, Dr. Nathanson concludes that pro-life proponents must become civilly disobedient.

Contrary to Dr. Nathanson, I submit that the official and unofficial legal procedures are effective; at least, the procedures are as effective as they can be. Nothing prevents pro-life proponents from conveying their message. We have political rights. We can vote with our conscience, electing people who promote our ideals. We have freedom of assembly. We can organize as we wish, within the confines of the law. We have freedom of speech and a free press. We can make our views known through radio, television, or newspapers. We can publish our own tracts or magazines.

The official and unofficial legal procedures for effecting change are available for use. Either pro-life proponents have not used these procedures completely, or if they have, the problem is not one with the procedures. Others hear what the pro-life proponents say, and do not accept it.

That does not prove a failure of the official and unofficial legal procedures, but a failure of consensus.

I will assume, however, that legal procedures are inherently biased, incapable of bearing the pro-life message.

7.3-classification

Since the moral consensus has fractured, pro-life activists cannot belong to the restorative but to the revolutionary disobedient. Even if pro-life activists and pro-choice proponents share a form of life, pro-life activists may behave as if no form of life were shared. Pro-life activists could belong to the unitive disobedient; they may determine that they belong to the dominative disobedient.

The tactics of pro-life activists show that they have made the judgments of the dominative disobedient. They sit in. They go limp. They chain themselves to hospital equipment. They do not attempt to appeal to a deep level of human response. They are not open to negotiation or dialogue. They do not recognize that their position lacks an indubitable foundation. The tactics of pro-life activists are designed to awaken the sleepers, to witness to beliefs, and to coerce those who disagree. Pro-life activists seek immediate results.

7.4-moral justification

Have pro-life activists sufficiently established the morality of their position?

I submit, with regret, that the pro-life activists fail to establish a primary condition of moral disobedience, the acceptability of their position. I believe that the pro-life position is correct; but given the divergence in judgments between pro-life and pro-choice proponents, talk of correctness is outside of its normal context. Moreover, pro-life activists

should recognize that their opponents are not fanatics careless of life; in the pro-choice ranks are decent, thoughtful people. Pro-life activists should recall that not all of the Churches, or even all of the groups within Churches, have the same attitude toward abortion as do pro-life activists.[419] The issues are finely balanced. If abortion were the equivalent of the Holocaust, direct, decisive action would be demanded. The equivalence, I must concede, is not obvious. The theoretical uncertainty of the position counts against the use of civil disobedience, a blunt instrument in ideological battle.[420]

Pro-life activists have difficulties overcoming the prima facie duty to obey the law, since their disobedience harms the common good.

The civil disobedience of pro-life activists weakens State mechanisms. The civil disobedience sets a precedent. The precedent is easily generalizable. Civil disobedience is becoming common enough now-a-days. Our politics is rapidly becoming a politics of extremist interest groups, which have no

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[419] see for example, "A Comparison of Church Statements on Abortion" (1986) Ecumenism 8, a copy of which was provided to me by a nun who is not radically pro-life; and Michael Czerny and Jamie Swift, Getting Started on Social Analysis in Canada (Toronto: Between the Lines Publishing Ltd., 1984): "When it comes to the very important issue of abortion, Canadians disagree strongly. Even among the Christian churches of Canada, there is profound disagreement. Similarly, the authors of Getting Started could not agree on a common approach to this issue. It has therefore been deliberately omitted": at 17. My experience is that ministerial considerations make the front-line Church workers are less fervent pro-life proponents than may be precisely consistent with authoritative Church positions.

[420] Lincoln, I note, does not advocate direct action to combat slavery. As I indicated above, he sought legal compromise. Lincoln trusts to his State systems: "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?....If the Almighty Ruler of Nations, with His eternal truth and justice, be on your side of the North, or on yours of the South, that truth and that justice will surely prevail by the judgment of this great tribunal of the American people": "First Inaugural Address", in Hofstadter at 396.

appreciation for or sophistication in the mechanisms of the State, which has functioned well until these modern times. As the State is weakened, as people claim that they are justified in acting outside its framework, the common good is threatened. If the State is worth preserving, civil disobedience should be avoided.

Do pro-life activists have better means of resolving issues than those of the State? I would rather have cases adjudicated in a Court than have issues decided by chaining the disputants to hospital equipment. Our State is not perfect, but it resolves problems better than direct action.

The civil disobedience of pro-life activists tends to be coercive. Pro-life activists have ample recourse to the official and unofficial procedures for effecting social change. They seek to claim a superabundance of political communicative power over their opponents by using civil disobedience. Furthermore, because pro-life activists have adequate access to the means of political discussion, insofar as pro-life activists attempt to obstruct the ordinary workings of society, their disobedience is coercive. Even more importantly, because legal procedures are available, pro-life activists are not simply trying to be heard, to communicate (directly or indirectly) their message. They seek to use modes of action like disobedience not to communicate, but to compel others, who will not listen, to do as the pro-life activists demand.

The civil disobedience of pro-life activists threatens the common good by weakening pluralism. Our society has a high level of tolerance. We tolerate white supremacists, Prof. Rushton's genetic racism, Satanists, odd religious sects. We do not tolerate groups that harm persons. Pro-life activists fasten on this limitation of tolerance to justify the limitation of pluralism; abortion harms persons. The difficulty is, of course, that that position begs the question. Whether pro-choice activities exceed the bounds of toleration is not definite. (I

say this despite my deep feeling that abortion on demand is wrong.)

The civil disobedience of pro-life activists has difficulties with the other criteria of moral law-breaking as well.

Pro-life activists must direct their response to immorality at the source of immorality. Pro-life civil disobedience arises from a breakdown in the moral consensus. The pro-life response should be directed at opposing citizens, not at the State. Pro-life activists' quarrel is not with the State, it is with pro-choice proponents. I do not think that the case can be made that the State--inclusive or exclusive of the Courts--is the agent of the pro-choice movement. The State is independent.[421] Indeed,

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[421] The Canadian State was, at least for a time, silent on the abortion issue--the abortion law was struck down, and none immediately filled the void. When the State is silent, is the State the accomplice of the pro-choice movement? Furthermore, the pro-life movement has frequently fared badly in the Courts. Does this make the Courts the agents of the pro-choice movement? To the latter question, I say no. Certainly judges' moral and political views colour their decisions. Nevertheless, I maintain that, generally or normally, judges are able to rise above their pre-judgments or pre-dispositions, and judge according to the law. I have never heard the pro-life movement assert that Canadian Courts deny fair hearings. Judges can only apply the law as it is; and, as it is, it does not favour the pro-life movement. This leads back to the former question, for if we had the requisite legislation, the Courts could rule in favour of the pro-life movement. To the former question, I say no. Parliament has members who are stridently pro-choice, and members who are stridently pro-life. Parliament is vexed by the issue of abortion. In my view, while silent, Parliament no more took a position on abortion than any other person in the throes of a decision. Parliament now, though, has an abortion bill, not yet law, which satisfies neither camp. The government intends to permit abortion in some circumstances judged to be improper by the pro-life movement. Will this make Parliament the accomplice of the pro-choice movement? No. The bill will create a space for permissible action, but the act of abortion is founded in the free independent will of women and doctors. Making Parliament responsible requires the further assumption that if a form of activity is immoral, the State must legislate against it. I argued above that the State should not legislate concerning all iniquity. I note that the logic of attributing responsibility to Parliament because

its problem is that it wants to please both sides of the abortion struggle, and finds itself unable to do so. Action directed at the State is not directed at the source of immorality, the pro-choice movement.

The civil disobedience of pro-life activists may not be appropriate in the time constraints. I am sensitive to the pro-life claim that children are dying. I note that Lincoln rejects anarchist impatience: "Nothing valuable can be lost by taking time."[422] Lincoln was well aware of the plight of the slaves. The abortion issue took time to grow. It is bound up with the emerging rights and disabilities of women. Pro-life activists should not expect to be able, quickly and easily, to remove the conditions fostering the pro-choice position. Long, hard work is required.

The civil disobedience of pro-life activists does satisfy the proportionality test. At stake are human lives. To preserve lives, drastic action may be necessary. If pro-life civil disobedience could satisfy the other criteria of moral responses, significant interferences with other persons could be justifiable.

The civil disobedience of pro-life activists must also be judged by its effectiveness.[423] Like other forms of dominative disobedience, pro-life activism is inherently ineffective, even if it secures its aims. It can hold its position only so long as

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Parliament permits abortion would allow us to attribute responsibility to God for permitting sin.

[422] ibid.

[423] While I have conducted no surveys, I am not aware of any statistical evidence that pro-life civil disobedience has converted anyone. Far from promoting the pro-life case, pro-life civil disobedience may be harming it. When civil disobedience promotes animal rights or environmental causes, the masses are sympathetic. The same sympathy is not held for pro-life civil disobedience. Pro-life civil disobedient are perceived to be fanatical, aggressive and blind to the difficulties faced by (some) pregnant women.

its strength exceeds the strength of opponents. The use of civil disobedience holds no promise of lasting success. Successful civil disobedience in the pro-life activist style would dominate, not reconcile, opponents. Successful pro-life activists would live like Plato's tyrant, fearful of insurrection in their own style.

In summary, the civil disobedience of pro-life activists faces justificational difficulties in almost every area of moral analysis. Is the civil disobedience worth the moral risk? Is it worth the risk of immorality? Is it worth the risk of aiding in the destruction of the body politic? I fear for our society. We believe that our way of life is triumphing over Godless communism. Perhaps it is; but our way of life is itself being defeated by immoral consumerism--standardless, private, shallow--interested only in current pleasure, requiring ever stronger stimulants. With the collapse of standards comes the collapse of the moral consensus that held us together. Moral communication is becoming impossible because we are ceasing to speak even similar moral languages. The tragedy is that the pro-life movement, at its best, represents an attempt to shore up our sagging moral framework. By saving the unborn, it is also saving us from our philosophies. Yet the risks of pro-life civil disobedience are significant. In my opinion, the civil disobedience of pro-life activists is not morally justifiable.

I will not end without noting a sign of hope. Contrary to Wertheimer, I submit that pro-life activists and pro-choice proponents share a form of life, despite their divergent judgments. What has happened is that in the late twentieth century, the institutions, moral assumptions, and social and familial roles which tended either not to support the pro-choice position, or which tended to make the pro-life/pro-choice issue not an issue, have lost their grip or become irrelevant. The circumstances of judgment have changed; and changes in judgment have resulted. The natural response to the unborn human has been

masked by social and political circumstances and responses to those circumstances.

If we assume that legal procedures are ineffective, and that the State is an agent of the pro-choice movement, unitive civil disobedience--not practised by pro-life activists--is morally possible. Pro-life proponents may engage in small scale, gentle, dignified, silent protests. These protests would be designed to uncover the deep human moral responses which we trust all humans share. Such protests set only a limited precedent. Others would not easily embrace the discipline of unitive disobedience. Such protests would not dominate political communication, would not clog the arteries of society, and, if conducted with proper dignity and humility, would not attract violence. Such protests would not aim at an immediate result, but would signify and would work toward eventual reconciliation. The recent quiet protest before Parliament by a priest could be justified on these bases.

Even moral unitive disobedience has its limitations. It is founded in action, in meaningful silence. The attraction of this action may be insufficient to reach to the deep humanity of the opponents of the disobedient. Where the opponents of the disobedient have had their judgments skewed by social and political circumstance, the good work of unitive disobedience may be blocked.

Pro-life proponents will never be able--and perhaps ought never to be able--to eliminate all abortion. Life is often tragic. Abortion, in some circumstances, will present itself as a real choice. Pro-life proponents should be concerned to limit choice to those tragic circumstances.

The abortion that should be the immediate concern of pro-life proponents is the abortion that is the choice of women entering the work force of late twentieth century capitalism, and of women caught in the coils of poverty. Civil disobedience will not change these women's minds. It will not overcome self-interest or the will to survive.

What can change women's minds is changing the circumstances of their lives, so that abortion ceases to be a perceived practical necessity. Pro-life activists and pro-choice activists share the human form of life. If pro-life activists are right, that form of life deserves respect from conception; and persons will give that respect, it is naturally elicited. With a change of circumstances, that natural respect may emerge, unobstructed.

The work to be done is not the destructive work of civil disobedience, but the construction of a better society.

The deeper, long term concern of pro-life proponents is with the more radical abortion on demand/abortion as birth control movement. Here the repair job is more difficult. The culture of self-centredness, of Nietzschean unconcern for others or for natural responses, must be--somehow--reformed. This reformation may not be impossible. In our time, we are witnessing a reformation of our attitudes to the world, and to the species that co-exist with us. Perhaps through the teaching of the sacredness of nature and of animal life, our experience of the sacredness of human life can emerge.

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